92-146

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO. 92-_____

SHARON K. CESARO,

Petitioner,

v

LAKEVILLE COMMUNITY SCHOOL DISTRICT, LAKEVILLE EDUCATION ASSOCIATION, AND THOR PETERSON; INDIVIDUALLY AND AS SUPERINTENDENT OF LAKEVILLE COMMUNITY SCHOOL DISTRICT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Should Defendant School District escape federal and state liability predicated upon the unlawful acts of gender discrimination committed by its Superintendent of Schools unless direct School Board animus is shown to exist at the moment of its vote denying Plaintiff's promotion; and where the unlawful acts committed by its Superintendent of Schools were:

1. Selecting a process of promotion intentionally calculated to prevent Plaintiff female employee a promotion because of her gender; and,
2. Defeating her promotion because of his animus towards advancement of females to administrative positions.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Sharon K. Cesaro, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in the above entitled proceeding on January 9, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit which reversed the Judgment of the United States District Court for the Eastern District of Michigan is reported and found at 953 F. 2d 252 (6th Cir., 1992) and is attached as Appendix A. The Motion for Rehearing and Rehearing En Banc was denied by the United States Court of Appeals for the Sixth Circuit on April 17, 1992. That Order is attached as Appendix B. The United States District Court for the Eastern District of Michigan found for Plaintiff-Petitioner Cesaro and against the Lakeville School District. Those Findings of Fact and Opinion and Order are attached as Appendix C (Finding of Fact, June 9, 1987), and D (Memorandum Opinion and Order on Damages, September 21, 1990).

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 9, 1992, and the Order Denying Rehearing and Rehearing En Banc was entered on April 17, 1992. This Petition for Certiorari is within ninety (90) days of that date. The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

QUESTION PRESENTED

Should Defendant School District escape federal and state liability predicated upon the unlawful acts of gender discrimination committed by its Superintendent of Schools unless direct School Board animus is shown to exist at the moment of its vote denying Plaintiff's promotion; and where the unlawful acts committed by its Superintendent of Schools were:

1. Selecting a process of promotion intentionally calculated to prevent Plaintiff female employee a promotion because of her gender, and,
2. Defeating her promotion because of his animus towards advancement of females to administrative positions.

STATUTES INVOLVED

a) Title VII of the Civil Rights Act of 1964 703(a)(1), 42 U.S.C.A. 200e - 2(a)(1) forbids an employer to:

> Discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individuals . . . sex. (Emphasis added)

b) Michigan's Elliott-Larsen Civil Rights Act, M.C.L.A. 37.2101, et. seq.; M.S.A. 3.548 (101), et seq., reads, in pertinent part at Section 22:

> An employer shall not do any of the following:
>
> a) Fail or refuse to fire, or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege or employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. (Emphasis supplied).

STATEMENT OF THE CASE

From 1968 to 1977, Petitioner Sharon Cesaro, had been a teacher and a quasi-administrator in a special education position for the Respondent, Lakeville Community School District in Genesee County, Michigan. In 1978, Lakeville School District decided that a new full-time administrative position, Director of Special Education, was necessary. Cesaro applied for the posted position because it was essentially the position she then held but without the official title. Cesaro was well qualified for the position, holding a Masters Degree, an Education Specialist Degree, and other certifications in the education of mentally impaired, emotionally impaired, and disabled field. She had completed all of her doctoral work, save for the doctoral thesis, and had served as president of the

Genesee County Association for Special Education Directors prior to completing her application for promotion. She was the only in-house applicant with experience and the credentials to be the new director.

Lakeville's Superintendent of Schools, Dr. Thor Peterson, had the discretion to recommend the appointment of an incumbent employee without soliciting outside applicants and had done so in the past. However, Dr. Peterson had publicly made it known that because of the dissatisfaction he had experienced with a previous female who had become a principal, he was determined "not to have any additional female administrators in the district." (App. C, 16c, fn 8). Two weeks prior to the actual selection of a male for the position, Peterson had stated, when discussing the candidacy of Cesaro with a school

board member, that Cesaro would only be hired as director "over my dead body." (App. C, 9c, fn 4). Thor Peterson's speech and actions constituted direct evidence at trial of sexual discriminatory intent on his part as the board's recruiter and employing agent. Dr. Peterson, only after viewing the Cesaro application, instituted an outside search in the entire state of Michigan for a director and came up with a white male who was appointed to the position.

Petitioner filed suit in 1980 in the United States District Court for the Eastern District of Michigan, claiming violations of Title VII of the Civil Rights Act and Michigan's Elliott-Larsen Civil Rights Act Docket No. 80-40001.

After a three-day non-jury trial, in 1987 Federal District Court Judge Stewart A. Newblatt presiding, it was found that Peterson's

motivation in accepting outside applications for the position was "in order to keep plaintiff [Cesaro] from obtaining [it] because she was a female." (App. C, 10c), and that if the hiring pool had only been done among Lakeville existing employees, as had occurred many times in the past, "there is no question but that the board would have appointed plaintiff." (App. C, 18c).

Thor Peterson had successfully "rigged"[1] the selection process due to his general opposition to "another woman administrator" and Cesaro was the "victim" of his Machiavellian

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"Rigged" - a term that usually has to do with equipment used and assembled to outfit a sailboat, or drill for oil. Here, however, a much more sinister connotation is intended - "to manuipulate or control usually by deceptive or dishonest means." G. & C. Merriam Company, Webster's New Collegiate Dictionary (1974)

maneuvers. The plotting of Peterson and his specific intent to engage in sexual discrimination is graphically shown in a recommendation letter he wrote on September 2, 1977, in Cesaro's behalf. She had applied for a director's position in special education in a nearby school district a year before the director's position was created in the Lakeville School District by Peterson.

Judge Newblatt, in his Findings of Fact, quoted at length from that letter:

> During the 1975-76 school year, Mrs. Cesaro successfully completed an administrative internship for the position of Special Education Director with the Clio (Michigan) Area Schools. Through this experience, coupled with her advanced training and thorough knowledge of the entire special education field, she has prepared herself extremely well for the position of Director of Special Education.
>
> Unfortunately, Lakeville's special education program has not yet grown to the point where we can justify a

> full-time director. However, when this time arrives, Sharon will be considered as our prime candidate. I know of her desire and feel she is fully prepared both professionally and personally to assume the responsibilities of leadership in the area of special education. (App. C, 16c)

(Emphasis supplied).

Such hypocritical and deceitful conduct on the part of Thor Petersen obviously is at the heart of Cesaro's case. He extolled the virtues of the applicant to others, but then refused to recommend or promote her.

The prime candidate was already in the Lakeville School District as evidenced by Petersen's own words. There was no real need to conduct a Michigan or Midwest search unless one intended to engage in sex discrimination concerning the Cesaro candidacy and attempt to change the outcome of who the new Director of

Special Education would be for the school district.

Petersen deliberately sought an applicant from outside the Lakeville School District to prevent the choice from going to Cesaro. The Federal District Court made an express finding that, "the Superintendent made the outside selection procedure expressly to avoid promoting Cesaro, because of her sex." (App. C, 20c).

After the position was posted statewide by Petersen, five persons ultimately applied. All of the applicants were interviewed by a "screening committee" selected by Petersen, which narrowed the field to three finalists; one of whom was Plaintiff-Petitioner, Cesaro. The Screening Committee found "all three qualified," and then presented their three finalist choices

to Superintendent Petersen, "without recommendation" or any ranking in terms of qualification. PETERSEN ADMITTED IT WAS HE WHO MADE THE FINAL RECOMMENDATION TO THE BOARD OF EDUCATION TO NOT PROMOTE CESARO. He recommended Gutshall, a male, for the position. When the matter came before the school board, all they had before them was Petersen's singular recommendation to hire the male candidate of his choosing, without an opportunity for the school board to consider the comparative qualifications of Cesaro or the other candidates. Thus, in reality, the Superintendent's "recommendation" was the de facto hiring decision because the school board, consistent with past practice, simply accepted the candidate recommended by Petersen without making an independent judgment. The conclusion of the discrimination then was the

Superintendent's decision to recommend hiring a male applicant, Gutshall, under the pretext of the best-qualified candidate, only to avoid hiring an admittedly qualified in-house female. The school board's typical uncritical acceptance of the Superintendent's recommendation thereby gave effect to Petersen's original discriminatory purpose.

The decision of the Court of Appeals of the Sixth Circuit, included a statement that Cesaro had conceded that the male was "more qualified" and that the Board did not act with a "discriminatory intent." The record in this case supports a contrary finding. Cesaro never conceded that Gutshall was more qualified. (App. A, 5a) All three finalists were qualified for the position. Cesaro's position is that the Respondent's Superintendent had injected

criteria in the selection process which would make the male, Gutshall, appear to be more qualified and further, blatant sex discrimination occurred in the selection process.

The record shows that Petersen's previous sexually discriminatory statements were made at school board meetings which should have alerted the school board to the Superintendent's discriminatory motives. The male-majority school board had in fact, on prior occasions, itself acted, or sanctioned, discriminatory conduct according to testimony at trial.

The Federal District Court issued its Findings of Facts and Conclusions of Law on liability on June 9, 1987. (App. C). A hearing on damages was then conducted on July 22, 1987. The District Court issued its Supplemental Memorandum Opinion and Order on Damages on

September 21, 1990. (App. D).

Defendant-Respondents, Lakeville School District appealed from that final Judgment. Plaintiff-Petitioner, Cesaro, cross-appealed on the damage issue and calculations. The appeal was filed in 1991 in the United States Court of Appeals, Sixth Circuit, docket numbers 90-2158 and 90-2223.

On appeal, the Respondents raised claims that the Conclusions of Law were inadequate pursuant to Federal Rules of Civil Procedure 52b, that the Findings of Fact were erroneous, and the Courts "but for" test imposed the burden of proof on the employer and thus constituted reversible error. Petitioner Cesaro, on appeal, obviously supported the trial court's Conclusion of Law and Findings of Fact and the test used by the trial court. On cross-appeal Plaintiff-Petitioner argued that the

interest rate awarded was inadequate under Michigan law and that retirement benefits and future damages awards should extend through the period past the 1992-1993 year. Further arguments were made January 1991 as to the applicability of costs and attorney fees as assessed by the trial court.

On January 9, 1992, the Federal District Court's Judgment was reversed by the United States Court of Appeals, Sixth Circuit (Cesaro v Lakeville, et al, 953 F.2d 252 (6th Cir. 1992) (App. A), and all damages awarded by the District Court were disallowed.

A Motion for Rehearing or Rehearing En Banc was later denied on April 17, 1992, by the United States Court of Appeals, Sixth Circuit. (App. B, 2b).

The United States Court of Appeals, Sixth

Circuit, in reversing the trial court, had found that Petitioner Cesaro's burden of proof at trial did not meet the pretext for the discrimination test of Title VII, Texas Department of Community Affairs v Burdine, 450 US 248, 254 (1981), and that the claim that Cesaro was a mixed motive case was likewise flawed (at 254). (App. A, 7a). The Court of Appeal's relied on Price Waterhouse v Hopkins, 490 US 228 (1989). They held that there had not been a showing that the discriminatory action occurred "at the moment of decision." They exonerated the school district from any liability. The United States Court of Appeals said:

> Petersen's decision to open the position to applicants outside the school district was not the ultimate employment decision that Price Waterhouse focuses on and therefore, Petersen's motivations in opening the position is not the relevant inquiry here.

Cesaro, p 254. (App. A, 9a-10a)

It remains Cesaro's position that Peterson, being the agent and employee of the school district, knew exactly what he was doing when he required solicitation of outside applicants. The Cesaro candidacy was doomed from the start due to sexual discrimination.

The United States Court of Appeals, Sixth Circuit, held that the purpose of Title VII is to focus on qualifications and that the school board here used a gender neutral method of choosing the director of Special Education in the Lakeville District. Peterson, was also acting on behalf and behest of the School Board in orchestrating the selection process and was hardly gender neutral.

Judge Newblatt's Findings of Fact also states Petitioner's position on this application:

> In these regards, the Court finds that Gutshall would never have had the opportunity to be considered for the

position, had Petersen not discriminated against plaintiff by refusing to recommend her promotion from within the school system. Moreover, Petersen would have made such an internal promotion recommendation had plaintiff been a male. The Board unknowingly and unwillingly gave effect to Petersen's discriminatory intent.

If the Board's defense here were to be accepted in the face of Superintendent Petersen's sexually discriminatory conduct, it could and would lead to the frustration of one of the purposes of

Title VII; providing a remedy for sexual discrimination in employment. If the Board's defense were accepted, all an employer intending to discriminate need do would be to hold the position open (by not naming a qualified black, Hispanic, or a woman [and now an Arab, a Jew or any other identifiable ethnic group]) as long as necessary to find an "acceptable" applicant with better qualifications to appoint. In no way does such conduct vitiate the illegal sexual discrimination; it merely masks it in apparently neutral camouflage and eliminates obvious critical evaluation because of the higher qualifications of the appointee. The conclusion is inescapable that but for the plaintiff's sex, she would have received this

> appointment and liability of the Board for this Title VII violation is properly determined based upon Superintendent Petersen's conduct in sexually discriminating against plaintiff.

(Emphasis supplied) (App. C, 18c-20c)

Thus, this Petition for Writ of Certiorari was filed. It is the Petitioner's position that the District Court's Findings of Fact and Conclusion of Law should have been upheld as to liability but the damage award should be amended to comply with Michigan's Elliott-Larsen Act. The case should not have been reversed by the United States Court of Appeals in the Sixth Circuit.

It is the Petitioner's position that the Federal District Court for the Eastern District of Michigan's Finding of Fact and Conclusion of Law should have been upheld. The Judgment of the

Federal District Court should not have been reversed by the United States Court of Appeals, Sixth Circuit.

REASONS FOR GRANTING WRIT

DISCUSSION - REASON I

I. There is a clear conflict of decisions among United States Circuits, and especially the Sixth Circuit in mixed motive cases where unlawful discrimination is a motivating factor but not at the instant of the final decision.

On January 9, 1992, the United States Court of Appeals, Sixth Circuit, reversed a Judgment of the United States District Court, Eastern Division of Michigan, which had found the Defendant guilty of illegal sex discrimination under Title VII of the Civil Rights Act of 1964 and the Michigan Elliott-Larsen Civil Rights Act in denying Plaintiff promotion to a newly created position of Director of Special Education for the Lakeville Schools. (App. A, 17a).

The District Court found that the Defendant's Superintendent, Petersen, unlawfully denied Plaintiff a promotion to the position of Director of Special Education because of her sex. Petersen had utilized a selection procedure which he opened to outside candidates instead of following past practice and promoting from within the school district's work force. That gave him an opportunity to select someone other than a female. He specified criteria in the selection procedure which discriminated against Plaintiff. The Court found that prior to Petersen's choice of the selection procedure, Petersen had stated in a letter, that Plaintiff was "well qualified" for the Directorship. (App. C, 16c). Knowing that Plaintiff, a female, would have to be given the position if he hired from within, and vowing to never hire another female, Petersen opted to

solicit applicants from outside the School District. The District Court made an express finding that the Superintendent had used this "outside" selection procedure expressly to avoid promoting Plaintiff "but for her sex." (App. C, 20c). IT WAS SUPERINTENDENT PETERSEN WHO MADE THE FINAL RECOMMENDATION TO THE BOARD OF EDUCATION TO HIRE FROM A GROUP OF THREE. When the matter came before the Board, all they had before them was Petersen's singular recommendation to hire a male candidate of his choosing, without an opportunity for the board to consider the comparative qualifications of Plaintiff or the other candidates. Thus, in reality, the Superintendent's "recommendation" was the de facto hiring decision because the School Board, according to past practice, simply accepted the candidate recommended by Petersen

without making an independent decision or directly confronting the Superintendent's choice. The Board's blind acceptance of the Superintendent's hiring recommendation thereby gave effect to his discriminatory purpose of sex discrimination against Cesaro.

Cesaro never conceded that the male, Gutshall, was more qualified. Petersen's animus toward women and his sexually discriminatory statements were made at Board meetings which should have alerted the Board that the Superintendent was acting out of discriminatory motives, and that the Board by its silence was condoning such discriminatory behavior.

When articulating the standard of causation to be used in a "mixed motives" case under Price Waterhouse, the United States Court of Appeals, Sixth Circuit, in Cesaro, focused on the

different parties involved in the employee selection process (Petersen and The Board of Education) and stated "We find no cases similar to the present case with its two levels of decision making." (Cesaro, 255). (App. A, p. 15a).

The Court made this observation, believing they were writing on a clean slate when adopting a novel interpretation of the proof required to establish causation in a "mixed motive case," precedents already existed. The United States Court of Appeal's, Sixth Circuit, interpretation of Price Waterhouse in the instant Cesaro case, now creates a direct conflict in this circuit with a majority holding of another panel which rejected the very same analysis used by the United States Court of Appeals, Sixth Circuit, just six days prior to oral argument in the

instant case. See, Simpson v. Diversitech General, 945 F.2d 156 (6th Cir. 1991) (App. E).

The employee in Simpson was discharged pursuant to a "last chance agreement," in which a 30-day suspension arising from a February 26, 1987 incident was reduced to seven days in settlement of a grievance; with the provision that he would be discharged if he was ever involved in a similar incident of alleged misconduct. Shortly thereafter, the employee was then discharged pursuant to the "last chance agreement" when he was involved in another disciplinary matter arising on June 18, 1987. The District Court in Simpson had held in favor of the employer, concluding that although the employer's superintendent (Ruckman) had acted with a racially discriminatory bias when he "initiated the disciplinary proceedings leading

to the last chance agreement which led to the discharge in June of 1987," no liability could be predicated on the present discharge itself, as neither the Defendant employer nor any agent of the employer, was guilty of discriminatory motivation in pressing the final accusations of misconduct or effecting the discharge.

Reversing and remanding, a majority of the Simpson panel said:

> Most important to the lower court with respect to the Price Waterhouse burden was 'the fact that Ruckman did not make the decision to terminate the Plaintiff.'
>
> THE DISTRICT COURT'S FINDING THAT RUCKMAN PLAYED NO ROLE IN THE FINAL DECISION WITH REGARD TO SIMPSON'S DISMISSAL DOES NOT END THE INQUIRY. . . If Ruckman initiated the disciplinary action leading to Simpson's dismissal due to Simpson's race, simply showing that Ruckman had no role in the 'final' decision to terminate him is insufficient to establish that Diversitech would have made the same decision even absent the racial animus. . .[T]he fact that Ruckman did not 'pull

> the trigger' is of little consequence. . (Emphasis added) (App. E, 21e)
>
> . . . This is so because absent Ruckman's race-based motive as found by the district court, there would not have been a last chance agreement. Nothing occurred after the second incident to expunge those actions. Thus, we conclude that there were impermissible racial motivations for the termination of appellant and it's genesis was, as found by the district court, in the response of Ruckman. 945 F.2d at 160. (Emphasis added) (App. E, 23e)

In the case at bar, Superintendent Petersen denied Plaintiff a recommendation for promotion from within, and instead instituted an outside search for another candidate to fill the position of "Director of Special Education." The

District Court in Cesaro found[2] plaintiff would have had the promotion and there would have been no outside search except for the sex discrimination. Therefore, the United States Court of Appeals should have held that there were "impermissible . . . motivations" in the failure to promote Cesaro. The trial court found their "genesis" was in the continuing and chronic sexually discriminatory statements and acts of Petersen. As in Simpson the trial court ruled that it was of little consequence that Petersen

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The District Court expressly states: In these regards, the court finds that Gutshall would never have had the opportunity to be considered for the position had Petersen not discriminated against Plaintiff by refusing to recommend her promotion from within the shcool system. Moreover, Petersen would have made such an internal promotion recommendation had Plaintiff been a male . . . The conclusion is inescapable that but for the Plaintiff's sex, she would have received this appointment and liability of the board for this Title VII violation is properly determined based upon Superintendent Petersen's conduct in sexually discriminating against the Plaintiff. (App. C. 18c-20c).

did not pull the trigger.

Judge Stewart A. Newblatt's opinion must be affirmed under the majority's holding in Simpson. The dissent in that case chides the majority for its rejection of the same reading of Price Waterhouse which now controls in the case at bar. Judge Cornelia Kennedy wrote the dissenting opinion in Simpson, she said:

> The court is adopting some sort of a 'but for' causation test in order to classify this as a mixed-motive discrimination case . . . The majority fails to recognize that the focus of the causation question itself must be on the decision maker making the challenged employment decision . . . The critical inquiry (under Price Waterhouse) . . . is whether the illegitimate consideration was a factor in the employment decision AT THE MOMENT IT WAS MADE." 945 F.2d 161-162 (Emphasis in text) (App. E, 35e).

The dissent in Simpson by Kennedy is essentially the holding in Cesaro in which she wrote in the instant case at bar. There is now a

direct conflict within the United States Court of Appeals, Sixth Circuit. This direct conflict between Simpson and Cesaro is the special reason for this Honorable Court to formally resolve the conflicting decisions of the United States Court of Appeals, Sixth Circuit.

DISCUSSION - REASON II

II. There is a conflict among the Circuits as to whether the unlawful discrimination of an upper management employee can be imputed to the decision maker.

The Sixth Circuit Court of Appeals in Cesaro held that irrespective of the intentional discriminatory motivation of the Defendant's Superintendent in choosing to deny Plaintiff "promotion from within" the employer is not liable. Although their Superintendent manipulated the selection process, the Defendant Board of Education would be absolutely insulated from liability under Price Waterhouse v Hopkins,

490 US 228 (1989), because the school board, itself, had not acted with intentional bias against Plaintiff "at the moment of the decision." It did not "pull the trigger." The Board accepted and implemented the Superintendent's recommendation to hire Dr. Gutshall for the position (Cesaro, 254, App. A, 17a). In other words, the board (or any employer for that matter), can only be held liable for it's own intentional discrimination, and may not be held liable on a "respondeat superior" theory for unknowingly implementing the discriminatory goals of even it's highest administrative official, it's Superintendent. Such an extreme insulated position, if indeed upheld, suggests a revolution in tort law. Judge Newblatt had made a specific finding that the knowledge of Petersen was to be imputed to the school board.

Plaintiff-Petitioner has pointed out that in Simpson the majority rejected Judge Kennedy's dissent and held that the racially discriminatory animus of an interim decision maker is properly imputed to the final decision maker in order to establish employer liability under Title VII.

The holding in Cesaro also directly conflicts with Farber v Massillon Board of Education, 917 F.2d 1391 (6th Cir. 1990), Reh. Denied; Cert. Denied 111 S. Ct. 952 where this court held that a board of education could be found liable for sex discrimination under Title VII for refusing to promote a teacher to a principalship, and rejected the Board's claim that it could not be held liable for whatever discriminatory motives may have been motivating it's Superintendent. The School Board's defense was that they simply accepted the Superintendent's recommendation, 917

F.2d at 1399. THE DEFENSE REJECTED BY THE FARBER COURT, IS ESSENTIALLY THE SAME DEFENSE ACCEPTED IN THE INSTANT CASE OF CESARO. Under Farber, the Board, as a Defendant, would still be liable under Title VII for blindly following the hiring recommendation of the District Superintendent, who was found in that case to be motivated by a discriminatory animus. Such animus was found to exist by the trial court in the instant case. Petersen had boasted that he was not going to promote another woman except "over his dead body." Anderson v Methodist Evangelical Hospital, 464 F.2d 723 (6th Cir. 1972), also holds that the employer is liable under Title VII for the discriminatory employment actions of it's supervisory personnel, notwithstanding the fact that the ultimate decision maker was acting without any discriminatory animus. In Anderson,

the United States Court of Appeals, Sixth Circuit, affirmed a finding of employer liability under Title VII for race discrimination in the discharge of an employee. They rejected the employer's argument that it should not be held liable for the actions of lower level supervisory employees who may have been racially motivated. The court in Anderson did "not find any facts which reflect that the Defendant corporation, or it's directors, or it's administrators possessed any willful plan or desire to resist social justice, or wished to discriminate or have any person in its employ discriminated against 464 F.2d at 725. The employer was, nevertheless, held liable for its supervisory employees' discrimination.

The holding in Cesaro also directly conflicts with Meritor Savings Bank v Vinson, 477 U.S. 57

(1986), which approvingly cites Anderson and rejects any per se rule that would insulate the employer from liability under Title VII:

> Thus, the courts have consistently held employer's liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known know, or approved of the supervisor's actions. Meritor Savings Bank, pp 70-71.

Instead of adopting any per se rule, the court in Meritor Savings Bank states that a determination of employer liability should turn on ordinary principals of "agency." They held that "absence of notice of an employer does not necessarily insulate that employer from liability . . ." Meritor Savings Bank, pp 70-72, citing generally to Restatement (Second) Agency, Section 219-237.

The Court of Appeal's, Sixth Circuit, Cesaro decision addresses only the trial court's finding

of liability under Title VII. It completely fails to address the alternate finding of liability under the Michigan Elliott-Larsen Civil Rights Act. Applying those same "agency" principals under the Restatement 2d as directed by Meritor Savings Bank, the court in McCalla v Ellis, 180 Mich. App. 372, 379; 446 N.W.2d 904 (1989) adopted Meritor Savings Bank as a matter of state law, and holds that the employer may be liable for illegal sex discrimination under state law notwithstanding lack of notice or lack of participating in the discrimination itself (there, the rape of an employee by a supervisor), stating:

> Under the Restatement (Second) of Agency, Section 219(2)(d), p 481, an employer may be liable for it's employee's actions where the employee 'was aided in accomplishing the tort by the existence of the agency relationship.' Even if the act is not within the scope of his employment and the employee's action is entirely for

> his own benefit, the employer may be liable where the employee exercises the authority actually delegated to him by his employer in acting so as to affect the employment status of subordinates. Where it is the employer's delegation of authority that empowered the supervisor to act, the employer can be found liable."

If the employer may be liable under state law for sexual harassment of an employee committed without the employer's knowledge or participation, so here the employer (school board) should be held liable under ordinary agency principles for sex discrimination. The school board delegated to it's Superintendent the power of decide whether to promote to administrative positions from within or to conduct a search out of the district. As a practical matter, the school board delegated to the Superintendent the power to choose the person

to fill the position. They did not review the relative qualifications of the candidates and followed their past practice of accepting the recommendation of the superintendent.

In reversing the trial court, the Court of Appeals, Sixth Circuit, Cesaro limited the inquiry to the legality of the Board's decision to hire Dr. Gutshall, at the instant the employment decision was finally made. Plaintiff could not therefore challenge the discriminatory denial of promotion, and the process utilized by the Superintendent to fill the position. A sexually based discriminatory "decision not to promote" should itself give rise to liability under Title VII.

To be sure, Price Waterhouse does direct that the motivation of the decision maker be examined "at the moment of the decision." Price

Waterhouse, 490 U.S. at 250, the court focused on the "policy Board's decision to place her candidacy (for partnership) on hold." 490 U.S. at 235. Nothing in Price Waterhouse, however, suggests that an employee can not challenge a supervisor's decision which is based upon a discriminatory intent. The employee should be able to recover under Title VII even though the entity itself is not guilty of any actionable direct misconduct relating to the decision. In other words, the illegality of the Superintendent Petersen's decision to deny Plaintiff a promotion, should not depend on the legality or illegality of the Boards "ultimate decision" to hire Dr. Gutshall. The inquiry should include the Board's refusal to hire Petitioner Cesaro, an in-house employee in the first place.

TITLE VII is much broader than the Cesaro court construed it. TITLE VII SUPPORTS A CHALLENGE when harm is CAUSED BY ANY DISCRIMINATORY EMPLOYMENT PRACTICE OR DECISION; not just the "ultimate decision."

In Texas Department of Community Affairs v Burdine, 450 U.S. 248, 259 (1981), the Court held that TITLE VII "PROHIBITS ALL DISCRIMINATION in employment based upon race, sex, and national origin . . " by requiring "fair and neutral employment and personnel decision." i.e. a "fair playing field."

In Cesaro, the inquiry is whether it would be unlawful for the Defendant Board of Education, through its appointed Superintendent, to put Plaintiff at a distinct disadvantage for promotion because of her sex. That specific misconduct was found to exist by the trial

court. The Sixth Circuit does not take issue with that Finding of Fact. The broad goals of Title VII would be manifestly disserved by a rule of law that requires the Court to disregard blatant acts of discrimination by other employees. Courts should not focus only on what the Board of Education was told by Petersen at the time the school board followed the Superintendent's recommendation to hire Dr. Gutshall at the very end of the process.

DISCUSSION - REASON III

III. The Court should resolve the question of whether section 107 of the Civil Rights Act of 1991, amendment of section 703 of Title VII of the Civil Rights Act of 1964, is to be given prospective or retroactive application.

On November 21, 1992, Congress enacted the Civil Rights Act of 1991. Section 107 of the Civil Rights Act of 1991 amends Section 703 of

title VII of the Civil Rights Act of 1964 by adding, the following:

> (m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that . . sex . . was a motivating factor for ANY EMPLOYMENT PRACTICE EVEN THOUGH OTHER FACTORS ALSO MOTIVATED THE PRACTICE." (emphasis added).

Even if Cesaro's construction of Section 703 of Title VII is not correct, the effect of this amendment would be to modify the interpretation of Price Waterhouse so as to require a finding of a violation of the Act where it is shown that sex was an improperly motivating factor in any part of the promotional process. It is clear in this case that Cesaro established that her sex was a motivating factor in Petersen's employment promotion practice. It does not matter whether the Board's ultimate hiring of Gutshall can be

defended if viewed in a vacuum. Thus, if the amendment applies retroactively, liability is established because the trial court found that Plaintiff's sex was an impermissible motivation in Defendant-Respondent's employment promotion practice.

Certainly, at present, there is a sharp conflict among various panels of the Circuit Courts of Appeal as to whether, on evidentiary and damage enhancement issues, the Civil Rights Act of 1991 should be applied retroactively to cases involving Title VII claims filed before its enactment. LaCour v Harris County, 57 F.E.P. Cases 622 (S.D. Tex. 1991); Alexandre v Amp, Inc., 57 F.E.P. Cases 622 (WD Pa., 1991); and, Mojica v Gannett Co, Inc, 779 F. Supp. 94 (N.D. Ill. 1991).

The Court in Mojica concluded that since it was clear that the conduct complained of was

unlawful long before the law was amended, then this factor did not militate against retroactivity. The same proposition holds true here since the discriminatory practice complained of was unlawful before the 1991 amendment to the Civil Rights Act.

If this Court finds that Section 107 applies retroactively to this action, then this Court will reverse the United States Court of Appeals because there is no question that Plaintiff's sex motivated the denial of the promotion; the District Court's Judgment should be affirmed and this cause remanded to the District Court for further findings on the issue of damages only.

Assuming for the sake of argument that this Court decides not to alter it's interpretation of Price Waterhouse, the Court of Appeal's finding that Cesaro has not made out a prima facie case

under Price Waterhouse should not preclude a finding that Cesaro has met her burden under a McDonnel Douglas Corp v Green 411 U.S. 792 (1973), analysis. Cesaro has previously argued that even if the Court found the evidence was insufficient to meet the Price Waterhouse threshold, the evidence nevertheless supports a conclusion that Cesaro met her burden of persuasion under the McDonnell Douglas framework. An analysis under both the Price Waterhouse and McDonnell Douglas frameworks is favored. See, Price Waterhouse v Hopkins, 490 U.S. at 278 (O'Connor concurring).

The United States Court of Appeals failed to perform an alternative analysis under the McDonnell Douglas framework. Therefore, Plaintiff-Petitioner requests this Court to either perform this analysis or remand this

matter to the District Court for further findings under the McDonnell Douglas framework.

Even the Defendant-Respondents admit it does. In their Brief in Opposition to Plaintiff-Petitioner's Motion for Rehearing at the United States Court of Appeals for the Sixth Circuit, at page 4, it states:

> Judge Kennedy's opinion in both cases [Simpson, Cesaro] directly relied upon and correctly applied the unambiguous language of Price Waterhouse, while the two-member majority in Simpson simply ignored the Supreme Court's binding precedence."

Simpson and Cesaro are from the same Sixth Circuit, months apart, and thus all parties to this appeal agree that those decisions are in conflict and this Court's prior decision in Price Waterhouse obviously is in need of clarification.

In footnote 3 at page 162, in Judge Kennedy's dissent, the following is cited as she admits:

> It is true that the Supreme Court in McDonald v Santa Fe Trail Transportation Co., 427 U.S. 273, 283 n. 10; 96 S. Ct. 2574, 2580 n. 10; 49 L. Ed. 2d 493 (1976) stated that when a Title VII plaintiff seeks to show that an employer's explanation for a "challenged" employment decision is pretextual, "no more is required to be shown than that race was a 'but for' cause." However, as the Price Waterhouse Court pointed out, McDonald dealt with the question whether the employer's stated reason for the challenged employment decision was a "pretext." 490 U.S. at 240 n 6, 109 S. Ct. 15 1785 n. 6. (Simpson, 162)(App. E)

Thus, Judge Kennedy, the author of Cesaro and the dissenting writer in Simpson, likewise agrees that a conflict exists.

The Court of Appeal's Circuit Judge Kennedy was the only Sixth Circuit Court of Appeal's Judge involved in both Simpson and Cesaro, feels a conflict exists, Simpson, 162 (App. E). She said the majority's reasoning in Simpson is

"flawed." (App. E, 34e). Defendant-Respondents' also claim that Simpson was wrongly decided. Plaintiff- Petitioner claims a conflict exists within the Sixth Circuit.

DISCUSSION - REASON IV

IV. If Cesaro is allowed to stand as a precedent, it will provide a blue print for employers who seek to discriminate against female employees without risk of liability for their wrongful conduct. It is bad law and defies the rules of fair play and social justice.

This is a particularly egregious case in which the discriminating supervisor clearly abused his authority over a subordinate female employee. He openly publicized his prejudice against female administrators generally, and especially Plaintiff personally. The only way she would get the promotion was "over my dead body." It is irrelevant that the Superintendent was not the person who "pulled the trigger "at the instant of the School Board vote. His poison

corrupted the process at every level from the start to the last act by the School Board.

This Honorable Court should, for the reasons stated, grant certiorari to resolve the conflicts in principle to Title VII causation standards among the Sixth Circuit panels and give the courts and the bar a clear statement as to causative factors as they relate to Title VII racial and sex discrimination actions.

The Court of appeals Cesaro reversed the District Court's Order in this cause. Petitioner feels that the Court of Appeals misconstrued the basis of the District Court's ruling that sex discrimination had occurred. Enforcement of Title VII abuses prohibitions against discrimination in employment, will be weakened if not destroyed if Cesaro is allowed to stand. It will make it possible for an employer to permit

its agent to deliberately manipulate and rig its selection process to minimize the chance that a female employee will be promoted. The employer can avoid Title VII liability as long as there is a possibility that a woman might get the promotion. Title VII's purpose of removing barriers and providing a "level playing field" for women and minorities will be seriously diminished if not destroyed.

For those reasons the Equal Employment Opportunity Commission joined with Plaintiff-Petitioner in Plaintiff-Petitioner's request for reconsideration before the Circuit Court of Appeals, Sixth Circuit, En Banc in March 1992. That Motion for Reconsideration and Rehearing was denied by the Sixth Circuit on April 17, 1992. (App. B, 2b)

Conflicts of lower court decisions do exist. Conflicting interpretations of Price Waterhouse abound in the Sixth Circuit. The importance of the question involved here does directly impact on the judicial future of Title VII. For those reasons Plaintiff-Petitioner requests this Court to grant a Writ of Certiorari.

CONCLUSION

WHEREFORE, Petitioner Cesaro respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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A P P E N D I X

Appendix A

Nos. 90-2158/2223
953 F.2d 252, (6th Cir. 1992)
UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Sharon Cesaro Plaintiff-Appellee, Cross-Appellant, v. Lakeville Community School District, Defendant-Appellant, Cross-Appellee, Lakeville Education Association; Thor Peterson, Defendants, Cross-Appellees.	On Appeal from the United States District Court for the Eastern District of Michigan

Decided and Filed January 9, 1992

Before: KENNEDY and SUHRHEINRICH, Circuit Judges: and PECK, Senior Circuit Judge.

KENNEDY, Circuit Judge. Defendant Lakeville Community School District appeals the District Court's finding

that defendant discriminated against plaintiff Sharon Cesaro on the basis of sex in failing to appoint her to a newly created position of Director of Special Education. For the reasons stated below, we shall REVERSE the judgment of the District Court.

I.

Plaintiff, Sharon Cesaro, served as a special education teacher for defendant, Lakeville Community School District, beginning in 1968. Her education included a bachelor's degree in elementary education, a master's degree and an educational specialist degree. At the time of the events complained of, she completed the necessary work for a doctorate in special education except for the doctoral thesis.

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In 1978 after an outside study of its special education program, the Lakeville Community School District decided to employ a Director of Special Education, an administrative position. Dr. Thor Petersen, the Superintendent of Schools, had sole discretion to decide whether to fill the position by soliciting applications from outside the school district as well as within or to open the position only to applicants from within the school district. Both of these procedures had been previously used to fill administrative positions. Petersen chose to post the position both within the school district and at major universities in Michigan. Evidence was presented at trial that before posting the position, Petersen had made remarks indicating

that he did not want to promote females into administrative positions and that he did not want plaintiff in the position. It is undisputed that the plaintiff was the only person within the school district who was qualified to fill the new position.

The District Court found that a screening committee interviewed the five applicants for the position without any gender bias and presented the names of three finalists, including plaintiff, to Petersen. There was no evidence, and plaintiff did not claim, that this committee was biased in any way. Petersen then recommended Dr. Gutshall to the school board as the most qualified applicant. The District Court found Dr. Gutshall was unquestionably

the most qualified for Director of Special Education. Indeed plaintiff stipulated that Dr. Gutshall was the best qualified of the candidates. The school board voted unanimously to appoint Dr. Gutshall.

Plaintiff filed a complaint in 1980 alleging sex discrimination. She alleged that Petersen posted the position rather than appoint her because she was a woman. Plaintiff claims that this discrimination in the method of selection caused the sequence of events resulting in plaintiff not being appointed to the position. Trial was held in November 1983 and the District Court issued its Findings of Fact in June 1987. The District Court found that plaintiff had been discriminated against on the basis

of sex by Petersen's decision to post the position statewide and that defendant failed to provide a defense sufficient to avoid liability. It found that had Petersen opted for solely intradistrict applications, plaintiff would have been approved by the board since she was the only qualified intradistrict candidate.

II.

Title VII forbids an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C.A. § 2000e-2(a)(1) (West 1981) (emphasis added). In the ordinary case, an inference of discrimination arises after plaintiff has made out a prima

facie case of discrimination under Title VII. The employer must then rebut the inference by articulating a legitimate nondiscriminatory reason for its action. The final burden of persuasion remains on the plaintiff to show that the reasons offered by the employer were not legitimate, but were a pretext for discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). Plaintiff asserts, however, that this is a mixed motive case. The Supreme Court has set forth a two-part test for determining whether an employer has unlawfully discriminated against an employee when an employment decision is made on the basis of a mixture of legitimate and illegitimate considerations. When a plaintiff in a

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Title VII case proves that her gender was a motivating factor in an employment decision, the employer may avoid liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not considered the plaintiff's gender. Price Waterhouse v Hopkins, 490 U.S. 228, 258 (1989). Gender plays a motivating part in an employment decision if one of the reasons "at the moment of the decision" was that the applicant was female. Id. at 250. Whether plaintiff's case is characterized as a pretext case or a mixed motive case, plaintiff's burden is to prove her gender played a part in the board's decision not to hire her as Director of Special Education.

Plaintiff has failed to demonstrate that her gender played any part in the school board's decision to hire Dr. Gutshall as Director of Special Education rather than plaintiff. The board members made the ultimate employment decision. Although the District Court's findings are not as detailed as one might like, it appears that it did find that the board acted without discriminatory intent. There is no indication in the record that the board was aware of Petersen's reason for posting statewide. Gender then was not a factor that influenced the board's decision to appoint Dr. Gutshall.

Petersen's decision to open the position to applicants outside the school district was not the ultimate

employment decision that Price Waterhouse focuses on, and therefore Petersen's motivation in opening the position is not the relevant inquiry here. After Petersen's initial decision to open the position to outside applicants, the selection process was gender neutral. Plaintiff was not precluded from being appointed to the new position; in fact, she was one of the finalists selected by the screening committee. Had she been excluded from consideration because of Petersen's bias, his bias would have been a factor in the board's decision. Ultimately, plaintiff was not chosen for the position because she was less qualified than Dr. Gutshall. The fact that she was a woman played no part in that decision. Thus, under a literal reading of Price Waterhouse,

plaintiff has failed to sustain her proof. That we are to look at the motive of the decision maker at the time the decision is made is reiterated several times in Justice Brennen's opinion:

> The critical inquiry, the one commanded by the words of §703(a)(1), is whether gender was a factor in the employment decision at the moment it was made. . . . When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations--even if we say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.
>
> ....
>
> We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.
>
> ....
>
> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its

> reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.

Id. at 241-42, 250 (footnote omitted) (emphasis added).

The Court's opinion makes clear that we consider recommendations based on gender to the extent they are relied on by the decision maker. Here, the board had the qualifications of all of the candidates and plaintiff concedes the most qualified candidate was selected.

Plaintiff argues, however, that Petersen's decision to open the selection process to outside applicants, which was motivated by sexual discrimination, establishes that gender played a part in the decision to hire Dr. Gutshall. Plaintiff asserts that Petersen's desire to exclude women from administrative

positions, which resulted in his decision to receive outside applications, resulted in discrimination against her because she would have been selected for the position if Petersen had considered only internal applicants.

Plaintiff is claiming then that she was discriminated against on the basis of her sex at the moment that Petersen chose the process to be used to select the Director of Special Education, and that she is entitled to recover based on this discriminatory decision. We are unwilling to accept this theory which potentially leads to an anomalous result. Under plaintiff's theory of recovery, she would be entitled to recover even if another woman was hired by the school board under the selection process chosen

by Petersen. Surely it was not Congress' intent to extend Title VII to a situation where a neutral selection process through which a woman was hired should give rise to liability to another woman who was not selected because of a decision preliminary to the hiring decision.

Plaintiff's theory also ignores the fact that even if Petersen's motive in opening the application process to outside candidates was discriminatory, a woman would still be selected by the school board if she were the most qualified candidate. It was also possible that the plaintiff would be selected by the school board as the Director of Special Education. At the time Petersen chose the selection process, it was uncertain whether any candidate more

qualified than plaintiff would apply.

We find no cases similar to the present case with its two levels of decision making. Other cases support our finding that when an employer selects a more qualified candidate, a claim of discrimination by a disappointed applicant is likely to fail. See Clark v. Huntsville City Board of Educ., 717 F.2d 525, 527 (11th Cir. 1983); Olafson v. Dade County School Board, 651 F.2d 393, 395 (5th Cir. 1981) (Unit B). In McQuillen v. Wisconsin Education Ass'n Council, 830 F.2d 659 (7th Cir. 1987), cert. denied, 485 U.S. 914 (1988), WEAC internally posted a newly created staff attorney position and five months later posted the position externally. A woman not then employed by WEAC was hired for the

position. A male employee of WEAC sued under Title VII, alleging that he would have received the position absent WEAC's preference to hire a woman because of an existing WEAC affirmative action policy. He claimed that the position was posted externally only in an effort to find a woman to fill the position. The Eighth Circuit found that the hiring procedures were generally the same as those used to hire a man for the staff attorney position created previously to the position at issue. The court found ample evidence that although the man was qualified for the position and had received a higher interview rating, he was not as qualified or as experienced as the woman who was hired. Similarly, in this case the application process did not preclude

a woman from being hired if she was the most qualified applicant. Although plaintiff was qualified to be Director of Special Education, she was not the most qualified applicant.

Had the board learned of Petersen's bias and chosen the same gender neutral method of selecting the candidate that was used here to neutralize that bias, it should not be faulted for doing so. The purpose of Title VII is to focus on qualifications. That is what the employer did here.

III.

We find that plaintiff was not discriminated against because gender was not a factor considered by the school board in its hiring decision. Although

Petersen may have acted with a discriminatory motive in opening applications to outside candidates, we cannot find liability for mere use of a process by which the most qualified candidate was ultimately selected in a non-discriminatory manner. Accordingly, the judgment of the District Court is REVERSED.

APPENDIX B

Nos. 90-2158/2223
ORDER: REHEARING DENIED
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHARON K. CESARO
Plaintiff-Appellee,
Cross-Appellant,

v.

LAKEVILLE COMMUNITY SCHOOL DISTRICT, A PUBLIC CORPORATION,
Defendant-Appellant,
Cross-Appellee,

LAKEVILLE EDUCATION ASSOCIATION, A VOLUNTARY UNINCORPORATED ASSOCIATION: THOR PETERSEN, INDIVIDUALLY AND AS SUPERINTENDENT OF LAKEVILLE COMMUNITY SCHOOL DISTRICT,
Defendants,
Cross-Appellees.

ORDER

BEFORE: KENNEDY and SUHRHEINRICH, Circuit Judges; and PECK, Senior Circuit Judge.

The Court having received a petition for hearing en banc, and the petition having been circulated not only to the original panel members but also to all

other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further review the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) LEONARD GREEN
Clerk

Filed, April 17, 1992

APPENDIX C

80-40001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

SHARON K. CESARO,

Plaintiff,

v. NO: 80-40001

LAKEVILLE COMMUNITY
SCHOOL DISTRICT,

Defendant. /

FINDINGS OF FACT

This rather typical Title VII sex discrimination case does present a somewhat unique problem and one which is obviously troublesome.

Plaintiff Sharon Cesaro was a special education teacher employed by defendant Lakeville School District. She had a Masters degree and had also completed all of the necessary work for her doctorate

in special education except for the thesis. She was without dispute well qualified to become the Director of Special Education in the District. 1/ In addition, she had considerable interest in the area. 2/

The District was not large enough to require a Director of Special Education until the 1978-1979 school year. Prior to the commencement of that year, the

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1/ On September 2, 1977, Superintendent Petersen wrote a letter to the Clio area School District supporting plaintiff's application for the position of Director of Special Education. " . . . she has prepared extremely well for the position of Director of Special Education." Plaintiff's Exhibit 2 (H). She did not receive the position.

2/ According to witness Esther Kish, plaintiff assisted her in forming a parents' group or association for children with special education needs.

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District determined to hire a Director of Special Education, a high administrative pose in the District.

Of course, plaintiff was interested and applied for the position. Thor Petersen, Superintendent of the District, decided to fill the position by selecting an applicant after posting the position and soliciting applicants statewide. Historically, administrative positions in the District had been filled either by promoting existing employees of the District or by appointing an applicant out of applications generated by posting, advertising and solicitating applications at large. In the past, Petersen chose the method to be used.

Five applicants responded to the posting. They were screened by an ad hoc

4-person Screening Committee selected by Petersen. The Committee was to evaluate the applicants and make a recommendation to the Board as to the most qualified applicant(s).

The Committee met, considered the applicants and their qualifications, and submitted to the Board a list of the three candidates it deemed most qualified. Plaintiff was one of the three. Although plaintiff was a highly qualified applicant, the Board selected Dr. Gutshall, who unquestionably was the most qualified for the position.

Plaintiff claims here, and defendant disputes, that the selection by the Board was based upon plaintiff's sex; that is, that Gutshall was selected as a consequence of discrimination against the

plaintiff because of her sex.

The plaintiff's theory is that under no circumstances would Superintendent Petersen accept a female in an administrative position within the school District; in pursuit of that attitude, he chose to solicit applications from outside the District. If he were to promote or recommend from among the current employees of the District, he would have been compelled to appoint the plaintiff, whom he had already recognized as exceptionally well qualified. Plaintiff then claims that what thereafter followed was the natural sequence of events which results from the original choice of Superintendent Petersen to avoid promoting plaintiff because of her sex.

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There is no claim here that either the Screening Committee or the Board acted with a discriminatory intent. And plaintiff has admitted that Dr. Gutshall was more highly qualified than she.

Thus, the Court is presented with a situation where both the actual appointing authority, the Board, as well as the Screening Committee, felt that Dr. Gutshall was a superior candidate and exercised their functions free from any intent to sexually discriminate. Thus, the primary questions are: (1) Was the Board's agent, Petersen, biased against female administrators, specifically the plaintiff in this case; and if so (2) did he give effect to that intention in his conduct in such a manner as to cause the

Board 3/ to sexually discriminate against the plaintiff?

The Board points out that Petersen denies any such intent to discriminate and argues that even if he had had such an intent, there was no relationship between his intent to discriminate and Dr. Gutshall's selection because plaintiff neither claimed nor presented proof that the Screening Committee or the Board acted from any sexually discriminating motive. In other words, the Board claims that inasmuch as the Board had no

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3/ There is no question but that the Superintendent of a Michigan School District is in such a position in relation to the Board that the Superintendent's policy and/or acts impose liability on the Board.

discriminatory intent and Dr. Gutshall has superior qualifications, the choice of applicants could not have been discriminatory.

Turning then to the first of the two significant liability factual issues: Did Superintendent Petersen have a discriminatory intent? While Petersen denied such intent under oath, the Court concludes that he did have an intent to sexually discriminate. Two witnesses have testified to his having expressed such intent, specifically an intent not to have any additional female administrators in the District

for which he was Superintendent. 4/ Neither witness was impeached in any way and the Board's counsel candidly

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4/ David Lewis, a first grade teacher, testified that when he was discussing Sally Bell who had been hired by the District in the administrative position of Elementary School Principal, Petersen said words to the effect: "Why did I hire that woman? I will never hire a woman again." Later in December, 1976, Lewis said Petersen stated in connection with Mrs. Bell: "I will never choose another woman for an administrative position at Otisville." And still later, at the Board meeting of April 19, 1977, again referring to Ms. Bell, Petersen said: "Why did I hire that woman?"

Tom Kennedy, Vice President of the Board of Education, spoke to Petersen about plaintiff's application for the directorship here involved approximately two weeks prior to the appointment, in July 1978, when Petersen said in referring to plaintiff's claim for the appointment, "over my dead body." (At that time Kennedy thought Petersen merely had a personality conflict with plaintiff. In reality, it is doubtful that there was a personality conflict in view of Petersen's letter, plaintiff's Exhibit 2(H)).

and consistent with the requirements of the applicable professional ethics, acknowledged that there was no evidence in the record which would suggest any basis to determine that the witnesses were lying or had a reason to fabricate.

Having determined that the evidence supports a finding that Superintendent Petersen did not intend plaintiff to ever have this position because of her sex, the next question may be paraphrased as follows: Was there a causal connection between such intention and plaintiff's failure to receive the appointment?; or, alternatively, but for Petersen's sexual prejudice, would plaintiff have received this appointment? It is with this second question that the Board makes its real defense,

a defense that is quite powerful and in many ways very persuasive. The Board says that Petersen exercised one of the following two neutral options available to him to obtain applicants for the position: (a) solicit applications from the existing personnel of the district; or (b) solicit applications from the public in general or at least outside of the district's existing work force. The Board states that both options are sexually neutral and have been selected at one time or another in the past by the superintendent to obtain applicants for open administrative positions. Next, having selected a sex neutral method of obtaining applicants, a Screening Committee was selected to evaluate the qualifications of the

applicants. The Board points out the Committee submitted to the Board, in a sexually neutral manner, the names of the three most qualified applicants. Admittedly, there is no evidence that the Screening Committee acted in any sexually biased manner. Finally, the Board argues that it, too, acted in a sexually neutral manner when it selected the most qualified candidate, Dr. Gutshall. Thus, the Board argues in defense that irrespective of Petersen's discriminatory intent, 5/ the Board never gave effect to this intent; there was no legal or factual sexual discrimination in the Board action which authorized hiring the most qualified

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5/ For purposes of this argument, the Board assumed that the intent was established.

applicant selected in a sexually neutral manner; 6/that the interposition of the

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6/ Here it is important to stress that there was no direct testimony that the Board acted with any discriminatory intent, because it demonstrates the power of the defendant's argument. While there were two incidents in the testimony suggestive that the Board may have acted in a discriminatory manner, those incidents really do not establish the discriminatory intent of the Board. Ms. Kovach, the Board President, indicated that she was never invited to the after-Board meeting get togethers with the Superintendent and the other Board members (all males) at a local bistro. Moreover, she was never invited to the Superintendent's cabin in Northern Michigan with the other Board members. There was one incident to which a witness testified that when the plaintiff and a male teacher co-chaired a committee, the Board wanted to hear from the male rather than the female member. While these incidents could support an inference that Board members and the Superintendent treated women differently on some occasions, they can hardly support the conclusion that the Board intentionally discriminated against plaintiff in this particular case.

unprejudiced Screening Committee and the unprejudiced selection by the Board prohibits a connection between Petersen's prejudice and the employment of Gutshall. 7/

While it is true that Petersen's decision to post the position statewide to solicit applicants from both within and without the district is a facially neutral decision, if that choice was made in order to keep plaintiff from obtaining the directorship because she was female, then this decision was used as an instrument of sexual prejudice. If Superintendent Petersen, but for his

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7/ This slightly misstates the issue, which is whether but for plaintiff's sex, she could have been appointed; it is not whether Gutshall was better qualified.

bias against female administrators, would have recommended promotion from within the system, then plaintiff clearly would have had the position and conversely, plaintiff, not having received the position would have been because of sexual prejudice.

In arriving at a factual finding on this crucial issue, it is impossible not to reexamine the letter written by Superintendent Petersen on September 2, 1977 in support of the plaintiff's application to the Clio School District for the Director's position there. (See Appendix A). Two paragraphs of that letter are extremely important in concluding that Superintendent Petersen chose the method of soliciting

applicants that helped him avoid selecting plaintiff. 8/

> During the 1975-76 school year, Mrs. Cesaro successfully completed an administrative internship for the position of special education director with the Clio (Michigan) Area Schools. Through this experience coupled with her advanced training and thorough knowledge of the entire special education field, she has prepared herself extremely well for the position of Director of Special Education.
>
> Unfortunately, LakeVille's special education program has not yet grown to the point where we can justify a full-time director. However, when this time arrives, Sharon will be considered as our prime candidate. I know of her desire and feel she is fully prepared both professionally and personally to assume the responsibilities of leadership in the area of special education.

8/ The Court has already found that Petersen did not want to recommend another female for an administrative position within the district.

It is clear that Petersen recognized plaintiff's ability to fill the position of Director of Special Education and was Lakeville's "prime canddiate." So here is Superintendent Petersen extolling plaintiff's virtues for an identical position in another school district. He apparently had no hesitation in recommending plaintiff for an administrative position so long as it was not during his administration as Superintendent. Less than a year later, and without any significant reason revealed in this record, Superintendent Petersen opted for a procedure which he then thought avoided the advancement of the person he had said was the prime candidate for that position. The only logical explanation in this record is sexual prejudice

toward women in administrative positions. Thus, it is clear that Petersen opted to solicit interdistrict applications because of prejudice. Had he opted for intradistrict applications, there is no question but that the Board would have appointed plaintiff.

Defendant contends that because it selected a male with better qualifications than plaintiff, 9/ an actionable act of sexual discrimination did not occur. This position is further underscored by defendant's emphasis on the non-discriminatory intents of the Screening Committee and the Board. In these regards, the Court finds that Gutshall

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9/ Presumably more administrative experience and experience in applying for grant funds.

would never have had the opportunity to be considered for the position, had Petersen not discriminated against plaintiff by refusing to recommend her promotion from within the school system. Moreover, Petersen would have made such an internal promotion recommendation had plaintiff been a male. The Board unknowingly and unwillingly gave effect to Petersen's discriminatory intent.

If the Board's defense here were to be accepted in the face of Superintendent Petersen's sexually discriminatory conduct, it could and would lead to the frustration of one of the purposes of Title VII; providing a remedy for sexual discrimination in employment. If the Board's defense were accepted, all an employer intending to discriminate need do would be to hold

the position open (by not naming a qualified black, hispanic, or a woman [and now an Arab, a Jew or any other identifiable ethnic group] as long as necessary to find an "acceptable" applicant with better qualifications to appoint. In no way does such conduct vitiate the illegal sexual discrimination; it merely masks it in apparently neutral camouflage and eliminates obvious critical evaluation because of the higher qualifications of the appointee. The conclusion is inescapable that but for the plaintiff's sex, she would have received this appointment and liability of the Board for this Title VII violation is properly determined based upon Superintendent Petersen's conduct in sexually discriminating against plaintiff.

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Counsel are directed to appear before the Court on the 15th day of July, 1987 at 2:00 p.m., to argue in detail the damage claims from the evidence of record.

IT IS SO ORDERED.

Dated: 6/9/87 (s) Stewart A. Newblatt

STEWART A. NEWBLATT
United States District
Judge

APPENDIX D

No. 80-40001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

SHARON K. CESARO,

Plaintiff,

v.

LAKEVILLE COMMUNITY SCHOOL DISTRICT, a public corporation, LAKEVILLE EDUCATION ASSOCIATION, a voluntary unincorporated association, THOR PETERSEN, individually and as Superintendent of Lakeville Community School District,

Defendants. /

MEMORANDUM OPINION AND ORDER ON DAMAGES

This case presents a combination of elements that is very rare and can be illustrated by describing the elements in the typical employment discrimination case in Federal Court in Michigan and comparing those to the elements in this case. The typical case presents a

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2-count complaint seeking recovery in one count under the federal statute, Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. § 2000e, and on the second count, under the similar Michigan statute, the Elliott-Larsen Act, MCL § 37.2101 et seq. The issues of liability are identical as the Michigan courts have clearly held that on liability, Elliott-Larsen tracks Title VII. There are important differences, however, in the area of damages. Under the federal statute, the plaintiff can recover back pay and in an appropriate case, either an order to be restored to the position with the employer, or "front pay," compensation for lost future pay. There is no recovery for emotional pain and suffering or anything else. This is described as a restitutionary recovery. Under the state

statute, one can normally recover all that which can be recovered under Title VII, but in addition, compensation for humiliation, mental distress, pain and suffering, inability to enjoy the pleasures of life, and damage to reputation. At this point, the state Act merely enlarges the category of damages over those under the federal act.

Two additional factors will cause problems: First, under Title VII, no injury is permitted as the law commits fact finding to the judge. Under the state Act, the right to a jury trial is preserved. In the typical situation, the plaintiff will demand a jury trial on the state law count. The law generally provides that where one theory is to be tried by a jury and one by the judge,

the count to be tried by the jury must be tried first. This is on the basis that the Constitution requires that the right to jury trial be preserved and to do so requires that count to be tried first. Under those circumstances, the Title VII count is rarely tried because the jury verdict on the state law count has more elements of damage than the Title VII count. Thus, the jury verdict controls the federal count under the principle of res adjudicata. In the present case, the trial was a non-jury trial because no jury was requested--a rather unusual circumstance. The second factor which makes this case rather unusual is that the discrimination in this case resulted in a physical and/or mental disability for which the plaintiff was eligible, and,

in fact, received workers' disability compensation payments under the state statute. MCL § 418.101 et seq. This is significant because under the Michigan disability compensation statute, the exclusive remedy against the employer for a claimant's work incapacitating injury is the disability compensation. This raises complicated questions of the effect of the disability compensation on the damages recoverable for the earnings loss resolved by the Michigan courts although the issue has been frequently articulated.

Thus, the two distinguishing features of this case are that (1) there was no jury trial first of the state law claim but liability identical under both the state and the federal statutes was tried

without a jury; and (2) that the act of discrimination led to injuries for which workers' compensation benefits were paid. The questions raised by these factors were not resolved in the cases cited by counsel.

After the Court's determination of liability, the parties sought an opportunity to settle this matter by voluntarily agreeding to economic terms which might have been more satisfactory to both sides than a monetary award entered by the Court and computed in accordance with law's rigidity. Much more flexibility is available through private agreement than through a court award, which must, in this case, reduce all damage factors to present dollars payable at one time. On September 6, 1988, after trying to arrive at a settlement, both counsel notified

the Court that an agreement could not be reached. The parties jointly requested the Court determine the damages to be awarded.

The basic data underlying the damage determinations are contained in the parties' "Stipulation of Facts Regarding Damages." The Summary of Plaintiff's Argument for Damages (Docket Entry #123) makes no mention of the federal statute and supports all claims by citations to decisions interpreting Michigan law. In view of the fact that the Michigan statute generally permits a greater scope of damages than the federal statute, the Court concludes that plaintiff is primarily relying on the Michigan Act, rather than the federal and thus, damages will be awarded in accordance with the

Michigan law.[1]

According to the Summary of Plaintiff's Argument for Damages, plaintiff seeks the following categories:

I Lost Wages

II Fringe Benefits

III Future Retirement Benefits

IV Compensatory Damages: Degradation, Humiliation, and Mental Distress

V Costs

VI Attorney's Fees

VII Exemplary Damages[2]

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[1]As previously stated, the scope of Michigan law on damages is generally more favorable to plaintiff as it allows compensatory damages as distinguished from restitutionary damages under Title VII.

[2]The Court's conclusion that plaintiff is seeking damages only under the state statute is reinforced by the request for "exemplary" damages. This is because exemplary damages may be awarded under the state Act and "punitive" damages under the federal Act. No punitive damages have been sought and none are awarded.

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DAMAGES

While counsel have made the damage phase simple by their stipulation of facts underlying the claimed damages, they have in a sense made the matter somewhat more difficult to decide because the stipulation contains bareboned facts and omits supplementary and ancillary information normally supplied to the fact finder.

The following damages are awarded:

I Total Past Lost Earnings -- $157,870.

This amount is arrived at by determining the wages lost as a teacher from 1978 to date and in accordance with Appendix I, deducting 2/3 of the teacher's salary. This leaves $118,870.

It must be increased by $39,000, the fringe benefit value for the same period.

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II Total Future Earnings Loss -- $40,135.

The basis is shown on Appendix II in the amount of $31,254 and similarly must be increased by the fringe benefit value of $8,870.

III Mental Distress Damages -- $37,690 -- for the period to date. See Appendix IV.

IV Future Mental Distress Damages -- $2,190 -- See Appendix IV.

As to future retirement benefits, no damages are awarded. The record is barren of any evidence with regard thereto, and thus, there can be no award therefor.

Because there were several critical damage issues of law which had never been decided under either Michigan or Federal law, the Court suggested that counsel try to resolve this case by

settlement. When they could not, Michigan law had to be applied by this Court. Since the issues remained unresolved by the Michigan Supreme Court at the time the parties communicated that they could not arrive at a settlement, there was some hope that the Michigan Supreme Court's determinations would be forthcoming. They were not, and waiting longer for guidance from the Michigan Supreme Court is not appropriate. Indeed, I have waited already much too long.

---

[3] An example is that the parties could settle future retirement benefits by compromising the dollars due in the future and then buying an annuity now to fund the future payment. The Court cannot do that. I cannot compromise the amount nor can I order an annuity to be purchased now. (Future retirement benefits were not actually awarded as the factual stipulation provided no evidence as to such benefits).

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The first question is quite easy. Does the exclusive remedy provision of the Workers' Disability Act bar any recovery against the employer under the Elliott-Larsen Act for wages, past and future, for a plaintiff who, as a result of the sexual discrimination has suffered either an emotional injury or physical injury or both which creates an entitlement to workers' compensation benefits? It is clear that for ordinary disabilities, disabilities that are not the result of a violation of some other statute such as the Elliott-Larsen Act, the exclusive remedy provision bars recovery against the employer.

I think it is also clear that where injury is the result of a violation of an anti-discrimination statute such as

the Elliott-Larsen Act, damages not provided under the Workers' Disability Act ought to be and are recoverable. These would include such damages as mental distress damage. No part of this is recoverable under the Workers' Disability Act, but is allowed under Elliott-Larsen.

The questions that are critical here are:

1. Can a plaintiff such as plaintiff here recover under Elliott-Larsen Act for the 1/3 of her compensation which she has lost and which is not paid under the Workers' Disability Act?

2. Can she recover under the Elliott-Larsen Act any part of the increased earnings she would have had had she not been denied the position of Director of

Special Education?[4]

3. If she can recover damages in relation to the earnings differential, is it the entire earnings differential or 1/3?

4. How does one account in damages for the fact that the Director position the plaintiff was discriminatorily denied, while paying a higher annual salary than the teacher position plaintiff had held, also required the plaintiff to work 24 more days a year to earn that salary. This is significant because the 24 days amounts to 13% more work days annually

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[4] Workers' disability payments are 2/3 of the amount plaintiff earned in the position which she held at time she became entitled to disability compensation. Thus she does not receive the 2/3 compensation for the pay differential on the job she was discriminatorily denied.

than the job plaintiff held when she was denied the new position. Yet the pay differential was only 9.6%.[5]

Thus, one can conclude that taking the higher position resulted in a reduction in pay because the pay differential did not compensate for the increase in work. How does one account for that in this case?

Having stated the key questions which are inherent in the damage computations and having further determined that the Michigan courts have provided no guidance

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[5] The average annual difference in pay between plaintiff's teaching position and the Director's position is $2,705, which is 9.6 percent of the teaching salary. [This was arrived at by taking the salary as a teacher for the nine years in the stipulation of facts and dividing by 9 and comparing it with the figure arrived by dividing total Director's salary for the same years and dividing by 9.]

other than that the exclusive remedy provision of the Workers' Disability Act does not bar an Elliott-Larsen Act claim when the injury sustained for an Elliott-Larsen Act violation results in compensation under the Workers' Disability Act (although not telling us that damages are reversible), the following are the conclusions which underlie the damage computations made.

First: Plaintiff is entitled to recover 1/3 of her salary as a teacher inasmuch as she has not been compensated therefor by Workers' Disability payments. The employer should not have to pay for the 2/3 because the employer has already funded that payment under the Workers' Disability Act. Moreover, plaintiff is entitled only to one salary and not a

double recovery.

Second: Plaintiff has suffered no economic loss by being denied the Director's position. Examining the economics, I find that the increased compensation of 9.6% over her teacher's salary to work 26 days a year more (amounting to 13% more work), establishes that there is no economic loss to plaintiff in relation to the salary differential.

SUMMARY OF DAMAGES

Past earnings loss	$157,870
Future earnings loss	40,135
Past mental distress	37,690
Future mental distress	2,190
	$237,885

This action was filed on January 8, 1980, obviously prior to June 1, 1980 and thus MCLA § 600.6013 provides for pre-judgment interest from the date of the

filing of the Complaint to entry of Judgment at the rate of 5 percent per annum. Diggs v. Pepsi-Cola Metropolitan Bottling Co., 861 F.2d 914 (1988).

Interest through September 19, 1990 totals $127,220.[6] Judgment should enter in the amount of $365,105 plus attorney's fees and costs.

SO ORDERED.

Date: 9/21/90 (s) Stewart A. Newblatt
STEWART A. NEWBLATT
United States District Judge

[6] Interest is a large amount because of the pendency of this suit. It must be remembered, however, that interest was computed at the rate of 5 percent per year, and the defendant had the use of these funds all these years. Had the defendant had to borrow these funds commercially, it would have had to pay a rate far in excess of the 5 percent rate required for prejudgment interest. Defendant in effect has had a windfall at the expense of plaintiff.

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APPENDIX I--PAST EARNINGS LOSS

The past wage loss is arrived at by deducting 2/3 of the wages for workers' compensation benefits the parties' stipulation established plaintiff received as a teacher through 1986-87 school year and a conclusion that it would be too speculative to award damages past 1992 because it would presume in the absence of any evidence that plaintiff's employability would remain static; that is, that she would be permanently unemployable and would not be able to or would not mitigate damages.

Using the figures as a teacher from the stipulation for the years 1978 through 1987, the total loss was $253,599. Since she received 2/3 thereof through workers' compensation, her loss for that

period would be 1/3 thereof or $84,533.

Assuming the same rate for the years 1987-88 through 1989-90 as there was for 1986-87, plaintiff would have lost an additional $34,337 (3 x 34337 - 1/3).

Plaintiff's total wage loss in the teaching position would then be $118,870.

This must be increased by the value of the annual fringe benefits which the parties stipulated to be $3,250 a year. For 12 years, this would be $39,000.

The total wage and fringe benefit loss would thus be $157,870.

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APPENDIX II--FUTURE EARNINGS LOSS

Assuming plaintiff would be earning $34,337 for the years 1990 through 1993 and would be receiving 2/3 by way of workers' compensation, she would have lost in gross figures the following:

1990-91	$11,446; present* value	$10,901
1991-92	11,446; present value	10,405
1992-93	11,446; present value	9,953
Future Earnings loss through 1993		$31,259

Fringe benefits

1990-91	$ 3,250; present value	$ 3,095
1991-92	3,250; present value	2,955
1992-93	3,250; present value	2,826
	Total	$ 8,876

Total earnings loss	$31,259
	8,876
	$40,135

* Present value determined by discounting at the rate of 5% per year according to Diggs v. pepsi Cola Bottling, 861 F.2d 914, (6th Cir. 1988).

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APPENDIX III--PAST MENTAL DISTRESS DAMAGES

[Plaintiff claims $200,000 arrived at by multiplying a daily loss of $17.02 per day ($6,215 a year) by a life expectancy of 32.18 years].

Plaintiff's computation is not accurate as it does not consider the damages to the present separately from those from the present into the future. Such a distinction is necessary so that a reduction to present value for the future damages can be made.

The Court's determination and computation are as follows:

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78-79 at $51 a day =	$ 5,475
79-80 at $14 a day =	5,110
80-81 at $13 a day =	4,745
81-82 at $12 a day =	4,380
82-83 at $10 a day =	3,650
83-84 at $ 9 a day =	3,285
84-85 at $ 8 a day =	2,920
85-86 at $ 7 a day =	2,555
86-87 at $ 6 a day =	2,190
87-88 at $ 5 a day =	1,825
88-89 at $ 4 a day =	1,460
89-90 at $ 3 a day =	1,095
	$37,690

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APPENDIX IV--FUTURE MENTAL DISTRESS DAMAGES

The Court finds that mental distress damages after 1992-1993 would be too speculative.

1990-91 at $3 a day; Present value* =	$ 1,095
1991-92 at $2 a day; Present value =	730
1992-93 at $1 a day; Present value =	365
Future mental distress reduced to present value	$2,190

---

* Present value determined by discounting at the rate of 5% per year according to Diggs v. Pepsi Cola Bottling, 861, F.2d 914 (6th Cir. 1988).

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No 80-40001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHARON K. CESARO,

Plaintiff,

v.

CIVIL ACTION
No: 80-40001

LAKEVILLE COMMUNITY SCHOOL DISTRICT, a public corporation, LAKEVILLE EDUCATION ASSOCIATION, a voluntary unincorporated association, THOR PETERSEN, individually and as Superintendent of Lakeville Community School District,

Defendants.
_____/

JUDGMENT

This action came on for trial before the Court, Honorable Stewart A. Newblatt, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

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It Is Ordered and Adjudged that judgment be entered for plaintiff, Sharon K. Cesaro, against Lakeville Community School District in the amount of $237,885 plus prejudgment interest in the amount of $127,220.00 for a total judgment of $365,105.00 plus attorney's fees and costs. Post judgment interest is at the rate of 7.78 percent.

Dated:

September 21, 1990

JOHN P. MAYER, CLERK

BY: (s)Ruth A. Joswiak
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

945 F.2d 156 (6th Cir. 1991)

Roosevelt SIMPSON, Plaintiff Appellant,

Appellant,

v.

DIVERSITECH GENERAL, INC.

Defendant-Appellee.

No. 90-3371

Decided Sept. 26, 1991

Before MERRITT, Chief Judge and KENNEDY and JONES, Circuit Judges.

NATHANIEL R. JONES, Circuit Judge.

In this employment discrimination action, plaintiff-appellant Roosevelt Simpson appeals the judgment for defendant-appellee Diversitech General, Inc. (Diversitech). For the following reasons,

we reverse the judgment below and remand for proceedings consistent with this opinion.

I.

On January 17, 1989, Simpson filed this action against Diversitech alleging discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964. A three day bench trial began on March 1, 1990, and resulted in a judgment in favor of Diversitech. The facts of this case are as follows.

Simpson began employment with Diversitech in July 1970. He worked as an embosser at Diversitech's Toledo facility. The facility produces vinyl-coated fabric and upholstery for automotive and furniture applications. During his employment

with Diversitech, Simpson was disciplined three times for violations of company rules and regulations. The third incident resulted in his dismissal.

The first incident for which Simpson was disciplined occurred on October 1, 1986. At that time, he was responsible for running vinyl covering through the embossing process. Before embossing the vinyl, Simpson was required to take a sample of vinyl covering to the quality control laboratory for inspection. When he took the sample of vinyl covering to the laboratory, he also brought a "hardboard" which contained the specifications against which the sample would be checked. While waiting at the laboratory, Simpson engaged in a conversation with Allen Haley, a white male and the stepson of

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William Dudgeon, Diversitech's Director of Human Relations. Simpson apparently requested that Haley share with him the food he was eating and Haley refused. Simpson then made a derogatory remark about Haley's Catholicism after which Haley referred to him as a "nigger." Haley called Richard Ruckman and informed him that Simpson was being disruptive and would not leave the lab. Ruckman, a white male,was the third shift superintendent and thus the third ranking company official on the third shift.

Before Ruckman arrived, Simpson left the laboratory with the hardboard. Pat Poirier, also a white male and a good friend of Haley, followed Simpson in order to get the hardboard from him. An

altercation occurred between Simpson and Poirier at the latter's work station over Simpson's refusal to relinquish the hardboard. Simpson "grabbed Poirier, squeezed him, and let him go." Poirier obtained a copy of a production ticket from a nearby desk and returned to the lab. The production ticket contained the same specifications on the hardboard. Later, upon being approached at his workstation and requested by Ruckman to hand over the hardboard, Simpson denied that he had it. He had actually placed the hardboard in the trash can near his work station, allegedly so that Haley could not hide it and blame the loss on Simpson. Ruckman did not take any disciplinary action but merely noted the incident in his log.

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After the shift ended, Piorier called David Baransky, Diversitech's Industrial Relations Coordinator, and reported the incident. Poirier demanded that some action be taken against Simpson. Normally, such an incident would be investigated by Dudgeon. But because he was Haley's stepfather, Dudgeon disqualified himself from the disciplinary inquiry. Baransky conducted an investigation and thereafter instructed Ruckman to issue an adverse personnel report on Simpson. Sometime before Ruckman issued the report, Baransky suspended Simpson for thirty days. The latter filed a grievance challenging his suspension and a hearing was held on October 2 and 3, 1986. Representing Simpson at this hearing was a union representative.

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Notes were taken by Diversitech and the Union. The minutes do not reflect that racial slurs or racial discrimination were alleged at the disciplinary hearing. Following the disciplinary hearing, Baransky concluded that Simpson was guilty of insubordination and disruption and ordered that Simpson be suspended for seven days, rather than thirty, with any further incident resulting in termination. Haley was not disciplined for the incident. The district court found that "Ruckman played no role in the discipline that resulted from [this] incident."

The second disciplinary incident occurred on February 16, 1987. Ruckman observed Simpson taking a break in an area that was not Simpson's assigned

break area. Ruckman told him to leave and return to his assigned area. Simpson refused and demanded that his union representative be called contending that he had the company's permission, via an earlier incident, to have his break in the area in question. After sending Simpson home for the remainder of his shift, Ruckman filed an adverse personnel report. Upon reviewing the report, Baransky discharged Simpson. This action led to the filing of a grievance which was denied by Diversitech. The company then offered to reinstate Simpson if he agreed to sign a Last Chance Agreement. In exchange for reinstatement, Simpson agreed in the Last Chance Agreement not to be involved in any similar incident in the future. The agreement provided that

any similar conduct by the appellant would result in termination.

The third and final disciplinary incident involving Simpson occurred on June 18, 1987. He was observed by Jerry Swartz, the tolex supervisor, in the tolex department. Simpson testified that he was there in an attempt to make sure that a new employee knew her way around the plant. Swartz directed him to return to his work station. Rather than complying with Swartz's instruction, the record shows that Simpson began arguing with him. Furthermore, Swartz testified that Simpson poked him in the nose while gesturing. Simpson denies it, but countered that Swartz called him a "nigger," which Swartz denies. The district court, however, found Swartz'

testimony more credible. Ruckman and a union steward, David Massie, were called and when Swartz began to explain the incident to them Simpson began to walk away, refusing to remain though requested to do so by Ruckman. Simpson was suspended subject to discharge and later permanently discharged.[1] A grievance was filed

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[1] Simpson contended below that Ruckman advised Swartz to take disciplinary action if appellant was ever in Swartz's department. The district court found that no such instruction was given by Ruckman. However, the court stated that even if such instruction had been given it would not have been inappropriate in view of appellant's status under the Last Chance Agreement. Further, a black employee, Sabrina Morris, testified that she was disciplined by Swartz for not doing work and for insubordination, but that two white workers who committed the same offense were not disciplined.

which was denied and later upheld by an arbitrator.

Ruckman often referred to Simpson as a "nigger" and a "lazy nigger." Moreover, the testimony of plaintiff's witnesses also testified that Ruckman often followed black employees around looking for an opportunity to cite them for company violations.

Although the court included that Ruckman played no role in the first incident, the court found that he had initiated the disciplinary proceedings leading to the Last Chance Agreement, which led to the discharge in June 1987. Thus, the trial court found that this was a mixed-motives case but concluded that Diversitech had carried its burden of showing that Simpson would have been

discharged even absent the racial animus. This appeal followed.

II.

In McDonnell Douglas Corp v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Supreme Court set forth the basic allocation of burdens of proof in a Title VII case alleging discriminatory treatment.

> To establish a prima facie case of discriminatory discharge, a plaintiff must prove by a prepondenance of the evidence: (1) [he] belongs to a protected class or minority; (2) [he] was qualified for [his] job; (3) [he] was terminated despite [his]qualifications; and (4) after

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> [he] was fired, [his] job remained open and the employer sought applicants whose qualifications were no better than [his] qualifications.

Trujillo v. Grand Junction Regional Center, 928 F.2d 973, 977 (10th Cir. 1991) (citations omitted); see also Potter v. Goodwill Indus., 518 F.2d 864, 865 (6th Cir. 1975) (per curiam) (in a Title VII discriminatory discharge case, plaintiff must show that he was a member of protected class; he was discharged without valid cause; and employer solicited applicants for the position). If plaintiff establishes a prima facie case of discrimination, the burden then shifts to the employer to articulate a legitimate non-discriminatory reason for its action. Burdine, 450 U.S. at 253, 101

S.Ct. at 1093. Should the employer meet this burden, plaintiff must then prove that the employer's proffered reason for termination was merely pretextual. Id. In addition, the Supreme Court held in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), that when a plaintiff in a Title VII case proves that race or gender played a motivating part in an employment decision the defendant "may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender [or race] into account." Id. 109 S.Ct. at 1795. With these principles in mind, we address the issues before us.

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III

The first issue[2] is whether the trial court erred in finding that racial animus did not exist in the October 1986 incident. Simpson contends that racial animus is clearly shown in the 1986 incident by the different treatment received by Haley, a similarly situated white employee.

[1] Due to the October 1, 1986 incident, Simpson was suspended and subjected to disciplinary proceedings. Haley, on the other hand, was neither suspended nor subjected to disciplinary proceedings.

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2 Simpson raised an evidentiary issue with respect to the district court's failure to admit the union's minutes, taken during the October 2 and 3, 1986 disciplinary hearing. Because we reverse this case on other grounds, the evidentiary issue is moot.

This discrepancy, however, does not alter the trial court's finding that no racial animus lurked behind the October 1986 incident.

Simpson and Haley exchanged derogatory remarks about one another during the October 1986 incident but neither was punished for those remarks. Simpson's resulting suspension from the incident was not due to his name-calling or use of abusive language towards Haley; rather, his suspension was due to his altercation with Poirier and to his insubordination to Ruckman.

The trial court's finding that racial animus played no role in the October 1986 incident is also supported by the finding that Ruckman played no role in the October 1986 incident. Ruckman merely noted

the incident of insubordination and misconduct on his log. Ruckman did not pursue an adverse personnel report until instructed to do so by his superiors. Further, the incident was brought to the notice of Ruckman's superiors by Poirer, not by Ruckman.

Taken together, the foregoing reveals that the district court's finding that the October 1986 incident was not grounded in racial animus is supported by the record.

IV.

[2] We must turn now to the more problematic portion of this employment discrimination case and address the question of whether the trial court erred in finding that Diversitech had met its burden of proving that Simpson would have been

discharged had race not been a motive. Simpson contends that absent the discriminatory motivation he would not have been discharged.

> The district court below found that it is more likely than not that plaintiff's race placed a role in Ruckman's response to the second incident, which in turn resulted in the Last Change Agreement, which was the basis for Plaintiff's discharge.

Hence, the court determined this case to be a mixed-motives case subject to the holding of Price Waterhouse. The court went on to conclude that Diversitech had met its burden of showing that it would have made the same decision absent the unlawful motive.

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The Court's conclusion that Diversitech had met its burden under Price Waterhouse was based on the following: (1) "Ruckman played no role in the final decisions that were implemented following each of the incidents;" (2) "the independent assessment and judgment of the other participants (i.e., Baransky and Dudgeon) functioned to attenuate the taint of any animus that may have motivated Ruckman;" (3) "Baransky made the final decision with regard to the first incident, and Dudgeon made the final decision with regard to the second and third incidents." Most important to the lower court with respect to the Price Waterhouse burden was "the fact that Ruckman did not make the decision to terminate the plaintiff."

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The district court's finding that Ruckman played no role in the final decision with regard to Simpson's dismissal does not end the inquiry. To be sure, Ruckman's superiors, Baransky and Dudgeon, made the crucial decisions after each of the three incidents, including the decision to terminate Simpson. The focus in this particular case, however, must be upon Ruckman's race-based actions. See Price Waterhouse, 109 S.Ct. at 1791-92 ("[A]n employer may not meet its burden in [a mixed-motive case] by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present[.]"). If Ruckman initiated

the discriplinary action leading to Simpson's dismissal due to Simpson's race, simply showing that Ruckman had no role in the "final" decision to terminate him is insufficient to establish that Diversitech would have made the same decision even absent the racial animus. As the evidence revealed that Ruckman disciplined Simpson in February 1987 because of his race and that the February 1987 incident led substantially to Simpson's dismissal, the fact that Ruckman did not "pull the trigger" is of little consequence. See Terbovitz v. Fiscal Curt of Adair County, Ky., 825 F.2d 111, 115 (6th Cir. 1987) (crucial question in mixed-motives case is one

of causation).[3]

The district court found that (1) it is more likely than not that Simpson's race played a role in Ruckman's response to the second incident; (2) the second incident resulted in the Last Change Agreement; and (3) the Last Chance Agreement was the basis of Simpson's discharge. The lower court's own factual findings indicate that Ruckman's race-based actions led to Simpson's discharge, having formed the predicate for the Last Chance Agreement. See Terbovitz, supra. The fact that he "played no role whatsoever in the formulation or entry of the Last Chance

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[3] Although decided prior to the Supreme Court's decision in Price Waterhouse, Terbovitz is consistent with Price Waterhouse.

Agreement" is of little import. This is so because absent Ruckman's race-based motive, as found by the district court, there would not have been a Last Chance Agreement. Nothing occurred after the second incident to expunge those actions. Thus, we conclude that there were impermissible racial motivations for the termination of appellant and its genesis was, as found by the district court, in the response of Ruckman.

This is not an easy case. The record clearly reveals that Simpson was an obstinate and, at times, a rather "mobile" employee. This fact, however, does not render race-based motives against such an employee justified. After careful review, we conclude that Diversitech did not carry its burden under Price Water-

house to show that it would have made the same decision absent the unlawful motive.

V.

For the foregoing reasons, we REVERSE the district court and REMAND for proceedings consistent with this opinion.

KENNEDY, Circuit Judge, dissenting.

Because the majority expands the scope of so-called "mixed-motives" discrimination under Title VII past its limits, I respectfully dissent.

Title VII forbids an employer to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The source of my disagreement with the

majority concerns whether, accepting the magistrate judge's factual findings, Simpson has shown that he was discharged "because of" his race under Title VII.

This case involves three separate incidents for which Roosevelt Simpson was disciplined by his employer for violations of company rules, culminating in his discharge. The trial judge found as a fact that there was no racial animus or evidence of any racial bias on the part of the actual decision makers who disciplined plaintiff on the three occasions, including his discharge. The magistrate judge therefore found that defendant had carried its burden of proving that the ultimate decision to discipline plaintiff on each of the three occasions would have been made in the

absence of any racial animus. This is a factual finding which is not clearly erroneous.

The only evidence of racial animus which the lower court substantially credited was the testimony of Mark Eckhart, that Richard Ruckman used a racial epithet when referring to plaintiff. The remarks were made in the office where Ruckman was doing his paper work and accompanied by Ruckman's complaints that the plaintiff was lazy and not doing his job. Simpson was not present.

The sole finding of the lower court with respect to racial animus is "I find that Ruckman had on occasion used that term [a racial epithet], and that such use manifests some perceptible degree of racial animus." Magistrate Judge's

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Opinion at 13.[1] It found that this racial animus "played a role in Ruckman's

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1. The court did not find, as the majority asserts, that Ruckman "often" racially slurred Simpson. Majority at 158. The majority also credits the testimony of several witnesses respecting Ruckman's racial animosity. Id. However, the magistrate judge in his opinion painstakingly summarized the testimony of each of those witnesses and found it to be substantially unbelievable, crediting the testimony only to the extent that it corroborated Eckhart that Ruckman had "on occasion" used the racial epithet "nigger."

The racial discrimination about which other of plaintiff's witnesses testified and which was found not credible by the magistrate judge was that Ruckman disciplined black employees but not white employees. However, the discipline records showed that both black and white employees were in fact disciplined for unauthorized absence from their departments or for insubordination. On the 39 disciplinary actions, discipline was given to 15 Whites, 6 Blacks and 3 Hispanics. Only one other employee was discharged for these offenses and he was white. Simpson did not produce evidence that any specific white employee was not disciplined for conduct similar to his own.

response to the second incident" which, taken together with the first incident, led to the Last Chance Agreement, the violation of which led to Simpson's discharge. Id. at 13-14.[2]

The majority finds that "Ruckman disciplined Simpson in February 1987 because of his race." Majority at 160. The lower court did not make that finding. Rather, it found only that racial animus played "a role" in Ruckman's response to the incident. The evidence showed that whites were also disciplined for insubordination or for being away from their departments. The magistrate judge made the findings that plaintiff

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[2] I note that the lower court never found nor implied that Ruckman had engaged in any efforts to discharge Simpson.

was insubordinate without cause on this second occasion and that plaintiff's contention that he had been permitted to take a break in that area was not supported by credible evidence. The discharge after the second incident was grieved. Plaintiff agreed to the Last Chance Agreement at a grievance hearing. The lower court rejected plaintiff's testimony that he entered into that agreement involuntarily.

The majority does not question the magistrate judge's finding that Simpson was insubordinate or that the conduct was grounds for discharge or that the decision to discharge was made not by Ruckman, but was made by his superiors who were not motivated by racial animus. Rather the Court is adopting some sort

of a "but for" causation test in order to classify this as a mixed-motive discrimination case. Apparently, the majority's syllogism is as follows: (1) "but for" Ruckman's racial animus, Simpson's violation of company rules at the time of the second incident would have been overlooked by Ruckman and would not have come to the attention of the actual decision makers; (2) the second incident was a factor in the ultimate decision to discharge Simpson (as one of the three separate infractions that together led to the decision to discharge); and, therefore (3) Simpson was discharged "because of" his race.

Suppose the misconduct had been a theft which was reported by a fellow employee in part due to racial animus.

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A neutral decision maker then decided to discharge based on the theft. Under the majority's reasoning, that discharge would be "because of" race. Here the causation is far more attenuated, as it was the combined effect of three separate infractions that led to Simpson's dismissal. The lower court found that racial animus played no part in the first and third incidents that led to Simpson's dismissal. Nor is there any question but that Simpson was guilty of the second infraction and the final decision maker in that episode harbored no racial animus.

Under the test of causation adopted by the majority today, if any part of an employee's disciplinary record can be shown to have been influenced by racial animus--apparently even where the employee was

guilty of misconduct on such occasion--any subsequent action taken by an unbiased decision maker who is considering the entire record is a decision "because of" race under Title VII. Surely that is not the law. The "but for" test is not the test of legal causation ordinarily used in tort law be-cause it is over-inclusive. It is over-inclusive here.[3]

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[3] The prevailing pattern of American legal thought is that "but for" cause is a necessary but not sufficient ground for establishing legal causation. See e.g., Restatement (Second) of Torts §§ 430-433, and comments (1965); 4 Harper, James and Gray, The Law of Torts ch. 20 (2d ed. 1986); H. Hart and A. Honore, Causation in the Law chs. IV, V (2d ed. 1985); Prosser and Keeton on the Law of Torts §§ 41-44 (5th ed. 1984). I see no reason why causation in Title VII cases should be treated differently, nor has the majority articulated any reason for its departure from the causation principles historically applied in such cases.

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[3] It is true that the Supreme Court in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282 n. 10, 96 S.Ct. 2574, 2580 n. 10, 49 L.Ed.2d 493 (1976), stated that when a Title VII plaintiff seeks to show that an employer's explanation for a challenged employment decision is pretextual, "no more is required to be shown than that race was a "but for" cause." However, as the Price Waterhouse Court pointed out, McDonald dealt with the question whether the employer's stated reason for the challenged employment decision was a pretext. 490 U.S. at 240 n. 6, 109 S.Ct. at 1785 n. 6. Here on the other hand, there is no claim that Diversitech used Simpson's three rules violations as a pretext for race discrimination. The only question is whether Ruckman's response to the second incident can fairly be said to be the "cause" of Simpson's discharge.

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The majority fails to recognize that the focus of the causation question itself must be on the decision maker making the challenged employment decision. The majority focuses on the supervisor's response to the second incident. However, the challenged employment decision is Simpson's final discharge.[4] Once the question is properly framed, the flaw in the majority's causation analysis becomes clear.

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[4] Even if Simpson is viewed as challenging the discipline he received following the second incident itself, the result is the same because it has been found that "Ruckman played no role in the final decisions that were implemented following each of the incidents." Magistrate Judge's Opinion at 14 (emphasis added). William Dudgeon, the Director of Human Relations for Diversitech, made the final disciplinary decision following the second incident. Id. The majority does not hold these findings clearly erroneous.

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In discussing when a case becomes a mixed-motive case under Title VII, the Supreme Court has held that "[t]he critical inquiry, the one commanded by the words of § 703(a)(1) [of Title VII], is whether [the illegitimate consideration] was a factor in the employment decision at the moment it was made." Price Waterhouse v. Hopkins, 490 U.S. 228, 241, 109 S.Ct. 1775, 1785, 104 L.Ed.2d 268 (1989) (Brennan, J. plurality opinion)(emphasis is original). See also id. at 241, 109 S.Ct. at 1785 ("When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex...."))(emphasis added); id. at 250, 109 S.Ct. at 1790 ("In saying that gender played a motivating part in an employment

decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a women.")(emphasis added); Id. at 246 n. 11, 109 S.Ct. at 1788 n. 11 (the focus is on whether "gender was a factor in a particular decision when it was made")(emphasis added).

Here it has been found that racial animus played no part in any of the following decisions: (1) the decision to file a report regarding the first incident; (2) the decision to discharge Simpson after the second incident; (3) the decision to allow Simpson to return to work if he signed a Last Chance Agreement; (4) the decision to report

the third incident; and (5) the decision to discharge Simpson after he violated the Last Chance Agreement. It is the final decision listed here, to discharge Simpson, which is being challenged. Under the Supreme Court's analysis the critical question is as follows: Was race a factor in the decision to discharge Simpson following the third incident, at the moment the decision to discharge was made? The magistrate judge answered this question "no." Therefore, I would hold that this is not a mixed-motive case as no prima facie case has been shown to establish that Simpson was discharged "because of" his race.

Finally, the magistrate judge concluded that defendant met its burden of proof that the "same ultimate decision

would have been made in the absence of the racial animus that appears to have motivated Ruckman's suspension of the plaintiff prior to the Last Chance Agreement." Magistrate Judge's Opinion at 14. That factual conclusion was not clearly erroneous and should be upheld.

The judgment in favor of Diversitech should be AFFIRMED.

Supreme Court, U.S.
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No. 92-146

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

SHARON K. CESARO,
Petitioner,

v.

LAKEVILLE COMMUNITY SCHOOL DISTRICT,
LAKEVILLE EDUCATION ASSOCIATION,
AND THOR PETERSEN,
INDIVIDUALLY AND AS SUPERINTENDENT
OF LAKEVILLE COMMUNITY SCHOOL DISTRICT,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Sixth Circuit Court of Appeals properly rule that female Petitioner failed to prove sex discrimination under Title VII when it held that the School Board, as the ultimate decision maker, had no discriminatory intent in hiring a more qualified male applicant as Special Education Director?

II. Is the School District liable for discrimination under Title VII when the School Board considered outside applicants (as it had in the past) for the newly-created administrative position of Special Education Director, where Petitioner and other female applicants were not precluded from being appointed to the position, Petitioner was a finalist candidate for the position, and a more qualified male applicant was hired?

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STATEMENT OF THE CASE

Petitioner Sharon Cesaro served as a special education teacher for Respondent LakeVille Community Schools, a small school district in Otisville, Michigan, beginning in 1968. (Cesaro at TR 100). Her education included a bachelor's degree in elementary education, a master's degree and an educational specialist degree from the University of Michigan; she received certification from the University of Michigan and the Michigan Department of Education. Petitioner completed the necessary work for her doctorate in special education except for the doctoral thesis. (Cesaro at TR 101). In 1976 Petitioner successfully completed a two-month administrative internship at the Clio Area Schools (Michigan) (Petersen at TR 319).

On September 2, 1977, LakeVille Community Schools Superintendent Thor Petersen wrote a letter of recommendation "To Whom It May Concern" regarding Petitioner. The letter detailed Petitioner's background in special education. It acknowledged that Petitioner had prepared herself extremely well for the position of Director of Special Education and that when the time arrived, she would be considered as the district's "prime candidate" for the Director position and noted that Petitioner was "fully prepared both professionally and personally to assume responsibility of leadership in the area of special education." (R. 115: Findings of Fact at p. 8; R. 117: Resume of Pltf's Key Exhibits at p. 2, Pl.Ex.2(H), R.159, 159).

In 1978 the School District commissioned an outside consultant, Dr. Mary Blair, to conduct a study of the special education needs of the district. (Petersen at TR 294). In April 1978 Dr. Blair concluded her evaluation and submitted a report (the "Blair Report") to the LakeVille School Board. In her report, Dr. Blair identified various problems which existed in the special education program, including the coordination between special and vocational education and developing grant applications. (Petersen at TR 300). Based on state and national incidence comparisons, Dr. Blair concluded that the needs of the district's handicapped children were not being met. Accordingly, she rec-

ommended creating a Director of Special Education position and hiring an individual with a wide range of administrative experience to fill that position. (Petersen at TR 295).

The Blair Report emphasized the importance of the Director having experience or preparation in all fields of educating the handicapped. The recommendations in the Blair Report further stressed that the Director should have training and experience in teaching/administering various types of special education programs. (R. 117: Resume of Pltf's Key Exhibits, Ex.3(A) at pp. 24-25, R.159, 159).

In accordance with those recommendations, the Board of Education approved the establishment and posting of a Director of Special Education position, a high-level administrative position. Suggested qualifications for the position contained in the posting were incorporated from the Blair Report. (Petersen at TR 296).

On or about May 10, 1978, LakeVille Community Schools posted the position and invited applications. (R. 9: Answer to Complaint at paragraph 6; Pltf's Ex.5(A), R.159, 159). The position was posted within the school district and at major universities in Michigan. (R. 99: Deft's Proposed Findings of Fact at p. 2). Five applicants responded to the posting; Petitioner was among those who submitted applications. (R. 115: Findings of Fact at p. 2). Historically, administrative positions in the district had been filled either by promoting current employees or by hiring candidates from outside the district. (R. 115: Findings of Fact at p. 2). Superintendent Peterson testified that when an administrative position was newly created, the Board's written policy required external posting. (Peterson at TR 301-302). No evidence was adduced that external posting of the position was discriminatory.

The required qualifications for the Director position included approval and certification as a special education director, a minimum of a master's degree, a valid Michigan teaching certificate, experience as a school administrator for general education

and/or special education programs, and eligibility for state reimbursement as a special education director. Desired qualifications included experience in writing grants and developing a curriculum. (R. 117: Resume of Pltf's Key Exhibits at p. 4, Pltf's Ex.3(G), R.159 159).

A screening committee was appointed by Dr. Petersen to review applications, interview candidates, and make a recommendation of finalists to the Superintendent. (Deft's Ex.H; R.62, 62). The four-person, ad hoc screening committee was composed of Donald Blackwell, Director of Special Education and Principal of Southwest Elementary School; Jacqueline Dorland, a special education teacher employed by the District; Michael Flanders, Chairman of the School District's Special Education Advisory Council; and Laura Dorn, a parent. (R. 117: Resume of Pltf's Key Exhibits, Pltf's Ex.4(A). R.159, 159).

The committee interviewed the five applicants in a sex-neutral manner and submitted the names of three finalists to the Superintendent, recommending Dr. Gutshall as the most qualified. (R. 115: Findings of Fact at pp. 2, 5). Dr. Gutshall had served for several years in leadership positions. He was a special education teacher for ten years in the Lansing Public Schools (Michigan), Director of Special Education for the Muskegon Area Intermediate School District (Michigan) for three years, Assistant Professor of Administration and Special Education at Eastern Michigan University, Director of Programs and Assistant Superintendent at Howell State Hospital, Director of Special Services for the Alpena Public Schools (Michigan), and was fully certified as a Director of Special Education. (Petersen at TR 320). Petitioner was one of the three finalists referred to Dr. Petersen. After interviewing the three finalists, Dr. Petersen concurred that Dr. Gutshall was the most qualified and recommended him to the Board of Education. On July 20, 1978, the Board voted unanimously to appoint Dr. Gutshall as Director of Special Education. (R. 115: Findings of Fact at pp. 2, 3).

Petitioner presented testimony that Dr. Petersen had made discriminatory statements to the effect that the hiring of Peti-

tioner would be "over his dead body" and that he would not hire another woman. Dr. Petersen denied making such statements and further testified that he had considered Petitioner a viable candidate throughout the selection process through the time that the Board of Education took action on the hiring.

Contrary to Petitioner's assertion on page 8 of the Petition for Writ of Certiorari, no evidence was submitted that supports the statement that "Dr. Petersen only after viewing Cesaro's application, instituted an outside search in the entire State of Michigan for a director and came up with a white male who was appointed to the position." Rather, the evidence and findings are that the Superintendent had the position posted statewide prior to considering Petitioner's application and that all applicants, including Petitioner, were considered by the screening committee.

Petitioner further erroneously claims that the Board of Education was presented solely with Dr. Petersen's recommendation to hire the male candidate of "his choosing, without an opportunity for the School Board to consider comparative qualifications of Cesaro or the other candidates." (Petition for Writ at p. 13). The facts belie that assertion. Petitioner had been a special education teacher at the district since 1968; she was not unknown to the Board of Education. The Board reviewed Dr. Gutshall's credentials which, without question, exceeded Petitioner's.

Petitioner continues on page 14 of her Petition for Writ of Certiorari to mischaracterize the case, and claims that the Superintendent had "injected criteria in the selection process which would make the male, *Gutshall*, appear to be more qualified and further blatant sex discrimination occurred in the selection process." The evidence adduced at trial was that the qualifications for the position of Director of Special Education were derived from Dr. Blair's report. Further, Petitioner fails to cite any criteria which were "injected" to make Dr. Gutshall "appear more qualified." Even a superficial review of Dr. Gutshall's qualifications confirms he was substantially more qualified than Petitioner.

On November 16, 1978, Petitioner filed a complaint with the Michigan Department of Civil Rights alleging sex discrimination by Respondent for its failure to appoint her to the Director's position. In 1980 Petitioner filed a civil Complaint alleging seven counts against the district, the LakeVille Education Association, and Thor Petersen, individually and as Superintendent of the LakeVille Community School District: Count I, violation of 42 USC §2000e-5; Count II, violation of Fifth Amendment, deprivation of liberty and due process; Count III, violation of Fourteenth Amendment; Count IV, violation of 20 USC §1681, discrimination under Title IX as recipient of federal financial assistance; Count V, tortious interference with advantageous contractual relations; Count VI, breach of duty; and Count VII, discrimination by Education Association. On May 13, 1981, Petitioner amended her Complaint, adding Count VIII, violation of 42 USC §1983, and Count IX, violation of Michigan's Elliott-Larsen Civil Rights Act. The only defendant at the trial was the School District; the remaining defendants either had settled with Petitioner or had been dismissed.

On June 9, 1987, three and a half years following a three-day bench trial which took place in November 1983, District Judge Newblatt issued his Findings of Fact, ruling in favor of Petitioner. (R. 115: Findings of Fact). In the Findings of Fact, the trial court only addressed the issue of the claim of violation of Title VII, 42 U.S.C. §2000e. More than three years later, on September 21, 1990, the Damage award was issued in the amount of $237,885, plus prejudgment interest in the amount of $127,220, post-judgment interest at the rate of 7.78%, and attorney fees. (R. 130: Judgment).

On January 9, 1992, the Sixth Circuit Court of Appeals issued its ruling reversing the trial court and finding that Petitioner failed to prove that her gender played any part in the decision of the Board of Education, as the ultimate decision maker, to hire Dr. Gutshall. *Cesaro v. LakeVille Community Schools*, 953 F.2d 252 (6th Cir. 1992). There was no evidence that the Board was aware of any sex-based reason for statewide

posting. Further, the external posting was not the ultimate employment decision on which *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), focused and, thus, Dr. Petersen's motivation was irrelevant. The Court of Appeals also noted that the application process did not preclude a woman from being hired if she were more qualified. Moreover, substantial case law confirms that when an employer selects a more qualified candidate, the discrimination claim by the disappointed applicant is likely to fail. *Id.* at 255.

Petitioner then filed a Motion for Rehearing or Rehearing En Banc claiming, primarily, that the Sixth Circuit misapplied *Price Waterhouse* as to the ultimate decision maker for finding liability, that the Court's decision effectively relieved the employer of liability, and that the Civil Rights Act of 1991 is to be applied retroactively to this case. Petitioner also claimed that a conflict exists in the Sixth Circuit as to application of respondeat superior liability to a two-tier decision making process. The Court of Appeals rejected the Motion on April 17, 1992, as a majority of the judges on the panel concluded rehearing was unwarranted.

SUMMARY OF ARGUMENT

The trial court found that the Respondent discriminated against Petitioner based upon her sex when it failed to promote her to the position of Special Education Director. Respondent sought outside applicants, as it had done in the past, and subsequently hired a more qualified male candidate. The trial court concluded that "but for" Petitioner's sex, she automatically would have been appointed to the Director's position, even though the solicitation of outside applicants was sexually neutral and both the screening committee and the Board of Education acted without discriminatory intent.

The Sixth Circuit Court of Appeals reversed the trial court, finding that, based upon *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Petitioner failed to carry her burden of proving that her gender was a motivating factor in the decision to hire a more

qualified male. The Court held that, consistent with *Price Waterhouse*, the Court is to look at the motive of the decision maker at the time the decision is made. The Board of Education lacked discriminatory animus, and the selection process did not preclude Petitioner from being appointed to the position.

The issues raised in Petitioner's Writ parallel those set forth in her Motion for Rehearing to the Sixth Circuit Court of Appeals which that Court declined to hear. Although Petitioner contends there is "a clear conflict of decisions amongst the circuits in mixed motive cases where discrimination is a motivating factor but not at the instant of the final decision," Petitioner fails to cite any circuits other than the Sixth Circuit to support her contention of such a "clear conflict." She references a single Sixth Circuit decision of *Simpson v. Diversitech, Inc.*, 945 F.2d 156 (6th Cir. 1991), *cert denied*, 112 S.Ct. 1972 (1992), to represent the conflict. However, the cases are factually distinguishable as *Simpson* involves the discharge of a black male following racist statements by his direct supervisor. In contrast, this case involves a hiring decision where a sex neutral policy was employed and the most qualified candidate was hired. Moreover, the Sixth Circuit Court of Appeals' application of *Price Waterhouse*, considering the motive at the time "a decision was made," is consistent with rulings of the Seventh Circuit and other Sixth Circuit decisions.

Petitioner's second argument is that a conflict exists among the circuits as to whether unlawful discrimination of upper management can be imputed to the employer. Petitioner cites this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and a Michigan Court of Appeals decision in *McCalla v. Ellis*, 446 N.W.2d 904 (1989), *lv denied*, 452 N.W.2d 641 (1990), to support this claim. Neither of those decisions address *Price Waterhouse*, the controlling case law. The Sixth Circuit opinion in this case and the *Price Waterhouse* decision left untouched the concept of respondeat superior where the "decision maker" discriminated, which is not the case here.

Thirdly, Petitioner argues that this Court should resolve whether §107 of the Civil Rights Act of 1991, 42 U.S.C. §2000e,

et seq., should be applied retroactively. All the Circuit Courts of Appeal addressing retroactivity of the Civil Rights Act of 1991 have found that it is *not* to be applied retroactively. No conflict exists, therefore negating the need for this Court to review the matter.

Finally, Petitioner asserts that the Sixth Circuit decision is "bad law and defies the rules of fair play and social justice." Respondent counters that Petitioner exaggerates the impact of the Sixth Circuit's opinion. The decision, contrary to Petitioner's assertion, does not forecast a demise of Title VII and employer liability, particularly if Petitioner is accurate in her assertion that the 1991 Civil Rights Act amendment would effect a different outcome.

ARGUMENT

I. THE SIXTH CIRCUIT'S HOLDING IS CONSISTENT WITH OTHER RULINGS, INCLUDING THIS COURT'S, IN ITS APPLICATION OF THE MIXED MOTIVE TEST REVIEWING WHETHER THE ULTIMATE DECISION MAKER HAD A DISCRIMINATORY ANIMUS AT THE MOMENT THE DECISION WAS MADE.

Petitioner's argument in Part 1 of her Brief distorts the evidence and the lower court's findings in an attempt to convince this Court that the extraordinary relief of certiorari be granted. A review of the evidence confirms that the Sixth Circuit properly ruled and that certiorari is unwarranted.

On page 23 of the Petition for Writ of Certiorari, Petitioner states:

> The District Court found that the Defendant's Superintendent, Petersen, unlawfully denied Plaintiff a promotion to the position of Director of Special Education because of her sex. Petersen had utilized a selection procedure which he opened to outside candidates instead of following past practice and promoting from within the school district's work force. That gave him an opportunity to select someone other than a female. He specified criteria in the selection procedure which discriminated against Plaintiff.

Contrary to Petitioner's assertions, a review of the opinions of both the District Court and the Court of Appeals confirms that the school district, in the past, had used both internal and external posting when hiring administrators. *Cesaro v. LakeVille Community Schools*, 953 F.2d 252, 253 (6th Cir. 1992) (R. 115: Findings of Fact at pp. 3, 11). Further, external posting of vacancies was sex neutral and could have resulted in the hiring of a female. *Cesaro*, 953 F.2d at 256. (R. 115: Findings of Fact at pp. 13-14).

Continuing, Petitioner states that the Board made no independent decision and that the Superintendent's "recommendation" was a de facto hiring decision. (Petition for Writ at pp. 24-25). This claim fails to recognize that Petitioner had been employed at the school district for ten years at the time of the posting. The Board knew that Petitioner's qualifications and background did not compare to those of Dr. Gutshall, the successful applicant.

Petitioner further claims that the Sixth Circuit's ruling is inconsistent with *Simpson v. Diversitech General,* 945 F.2d 156 (6th Cir. 1991), *cert denied,* 112 S.Ct. 1072 (1992). In *Simpson,* the issue was whether a black, male employee was discriminatorily discharged for misconduct under a last-chance agreement. The supervisor who recommended the discipline that resulted in the last-chance agreement had referred to the plaintiff as a "nigger" on a number of occasions. The supervisor, however, played no role in the investigation or action of misconduct or in drafting the agreement. The trial court applied the mixed motive test of *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), and dismissed the case as the employer proved that the plaintiff would have been discharged even in the absence of discrimination.

The Sixth Circuit found in the plaintiff's favor and determined that nothing had occurred between the second incident and formation of the last-chance agreement which expunged the supervisor's discrimination, reversing the trial court and remanding the case. Judge Kennedy dissented, stating that there was no evidence of any racial bias by the actual decision makers who disciplined plaintiff, citing *Price Waterhouse.* She also outlined relevant facts not presented in the majority opinion.

Here, the trial court's Findings of Fact fail to support the conclusion that the decision to post the vacancy statewide was related to Petitioner's sex. Judge Newblatt noted that the Respondent had in the past posted administrative vacancies both internally and externally. Unlike *Simpson,* in which the discrimination was related directly to race and casually related to discipline, the statewide posting was sex neutral and did not foreclose Petitioner

from the promotion. Neither the posting nor the decision to post was discriminatory. No evidence was adduced that Dr. Petersen would *not* have posted statewide if an internal male candidate existed. Moreover, the external posting of a newly-created administrative position was a reasonable and logical action aimed at assuring the hiring of the best qualified candidate.

Further, a screening committee interviewed the applicants and found Dr. Gutshall to be the most qualified candidate. The Board of Education is statutorily vested with the authority to hire administrators. MCL 380.132; MSA 15.4132 The Board is the only entity which can make such decisions, and it acted without discriminatory intent. *Simpson* also is distinguishable as the supervisor's references to the plaintiff as a "nigger" were unequivocally racist and discriminatory. In contrast, the remarks ascribed to Dr. Petersen were not nefarious or inflammatory. Stray remarks do not give rise to a colorable claim of discrimination. *Price Waterhouse*, 490 U.S. at 277.

Assuming that the *Simpson* and *Cesaro* cases are indistinguishable, Judge Kennedy's dissent in *Simpson* is more persuasive as she properly relied on *Price Waterhouse*. In *Simpson*, Judge Kennedy cited Justice Brennan's plurality opinion, stating:

> In discussing when a case becomes a mixed-motive case under Title VII, the Supreme Court has held that [t]he critical inquiry, the one commanded by the words of §703(a)(1) [of Title VII], is whether [the illegitimate consideration] was a factor in *the* employment decision *at the moment it was made*." . . . ("When, therefore, an employer considers both gender and legitimate factors *at the time of making a decision*, that decision was (" 'because of' sex . . .") . . . ("In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer *at the moment of the decision* what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.") . . . (the focus is on whether gender was a factor in a *particular* decision

> *when it was made*") . . . (Emphasis in original). *Simpson*, 945 F.2d at 162-163.

Writing on behalf of the Court in *Cesaro*, Judge Kennedy similarly explained:

> Gender plays a motivating part in an employment decision if one of the reasons "at the moment of the decision" was that the applicant was female. . . . Whether plaintiff's case is characterized as a pretext case or a mixed motive case, plaintiff's burden is to prove her gender played a part in the board's decision not to hire her as Director of Special Education. (Citations omitted). *Cesaro*, 953 F.2d at 254.

Judge Kennedy's opinion in both cases directly relied upon and correctly applied the unambiguous language of *Price Waterhouse* while the two-member majority in *Simpson* simply ignored this Court's binding precedent. The discriminatory action alleged here was the hiring of a more qualified male candidate by a board of education which had no discriminatory animus. The *Price Waterhouse* analysis established by this Court avoids unrelated or irrelevant events resulting in tenuous findings of discrimination.

More recently, the Sixth Circuit in *Wilson v. Stroh Brewery*, 952 F.2d 942 (6th Cir. 1992), reviewed the applicability of *Simpson* in a discharge action. Plaintiff, a black male, averred that the general manager's racial animus infected the decision of the industrial relations director to discharge plaintiff for insubordination. The plaintiff argued that the manager's intent should be imputed to the decision makers who lacked any racist bias. The employer responded that the racist comments or desires of an intermediate level supervisor do not establish a prima facie case of discriminatory discharge when an upper level official made the decision and conducted an independent investigation. The trial court granted the defendant's motion for summary judgment, finding that the plaintiff had failed to carry his burden of proof as

he showed no nexus between the manager's bias and the decision to terminate.

On appeal, the Sixth Circuit labeled the issue as whether the plaintiff submitted evidence that the manager's racial animus was the cause of his termination. The Court found that the plaintiff had failed to submit evidence that the manager's discriminatory motive influenced the decision makers. The plaintiff cited *Simpson,* but the Sixth Circuit rejected its application. The Court explained:

> *Price Waterhouse* offers some illumination in this case. The Supreme Court stated, "[i]n saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer *at the moment of the decision* what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." . . . In Wilson's case, there is no evidence that any of Roselli's reasons for discharging Wilson related to race. During his deposition, Wilson was unable to offer any evidence that either Holloway or Roselli was in any way racially motivated. This is not a "mixed motives" case. (Emphasis added). *Wilson,* 952 F.2d at 946.

Summary judgment was affirmed. See also *McCarthy v. Kemper Life Insurance Co.,* 924 F.2d 683 (7th Cir. 1991); *Rush v. McDonalds Corporation,* 966 F.2d 1104 (7th Cir. 1992); *Greanias v. Sears, Roebuck & Co.,* 774 F.Supp. 462 (N.D. Ill. 1991).

Other circuits have reached the same conclusion as did the Sixth Circuit in *Cesaro.* In *North v. Madison Area Association,* 844 F.2d 401 (7th Cir. 1988), the plaintiff alleged that he was discriminatorily discharged based upon a supervisor's recommendation to the board of directors. The supervisor, according to the plaintiff, harbored racist bias. The court ruled that although the plaintiff claimed that the board of directors was a "rubber stamp" for the supervisor, the evidence did not support such a holding. No evidence suggested that discrimination played any role in the

board's decision to terminate the plaintiff despite the supervisor's assertion that he ran the board. The Title VII action was deemed meritless.

Likewise, the Seventh Circuit in *Partee v. Metropolitan School District,* 954 F.2d 454 (7th Cir. 1992), addressed the imputation issue in a manner paralleling the Sixth Circuit's action in this case. The plaintiff alleged that the superintendent violated her First Amendment rights of freedom of speech when he advised her not to speak publicly about students' standardized test scores. The trial court granted summary judgment to the defendants on a §1983 claim for First Amendment violations. The district court held that the school district was not liable under respondeat superior for the superintendent's actions. The appellate court affirmed, stating:

> The district court decided that the school board, not McDaniel, has final policymaking authority regarding Partee's out-of-classroom speech. The district court relied on Indiana law and school district policy in coming to this conclusion. First, Indiana law provides that school boards, not superintendents, have the authority to "prepare, make, enforce, amend, or repeal rules, regulations, and procedures for the government and management of the ... school corporation, its agents, employees and pupils.... Superintendents, by contrast, have the power merely *"to make recommendations to the board* concerning ... the employment and dismissal of personnel, ... and all other matters pertaining to the conduct of the school ..." ... Superintendents have the power to make recommendations, but school boards set final policy. In addition, School District Policy ... provides that teachers should consult with their superintendents "before initiating any statements concerning the general welfare of the school system." Any decision by the superintendent under this policy was not final, however, because Partee could have

appealed to the school board. (Emphasis in original, citations omitted). *Partee,* 954 F.2d at 456.

Likewise here, no evidence supports the conclusion, even assuming Dr. Petersen had a sexist intent, that his sentiment infected the hiring decision "at the time the decision was made" or influenced the Board members to hire the more qualified male applicant. The Superintendent did not have the authority to hire administrators. Petitioner has failed to prove her case, and the earlier decision must be sustained.

II. NO CONFLICT EXISTS AMONG THE CIRCUITS AS TO WHETHER THE UNLAWFUL DISCRIMINATION OF AN UPPER MANAGEMENT EMPLOYEE CAN BE IMPUTED TO THE EMPLOYER.

It is Petitioner's contention that there is a conflict among the circuits on the application of respondeat superior where an upper management employee is involved and that the Sixth Circuit's ruling in this case would absolutely insulate boards of education from liability. Petitioner re-writes the Court's decision in her description of the ruling when she asserts that a "board (or any employer for that matter) can only be held liable for *it's [sic] own* intentional discrimination and may not be held liable on a 'respondeat superior' theory for unknowingly implementing the discriminatory goals." (Petition for Writ at p. 33).

Nowhere in the Court of Appeals' decision is such a holding expressed or implied. Instead, the Court found that an employer is liable where the individual or entity, such as a board, making the decision discriminates on an unlawful basis. An action—even if it may be unlawfully discriminatory—which is not the event precipitating the alleged discrimination, does not give rise to a viable complaint.

Petitioner cites *Farber v. Massillon Board of Education,* 917 F.2d 1391 (6th Cir. 1990), *cert. denied,* 111 S.Ct 2851 (1991), to support her position that the Board of Education in this case is improperly being relieved of liability. Plaintiff's reliance on Farber

is misplaced. A review of *Farber* reveals that it does not address the issue of respondeat superior or affect the absence of discriminatory intent by the decision maker. Moreover, in *Farber* the successful male applicants were clearly less qualified than the older female applicant who had more years of experience in the school district and was repeatedly denied promotions.

In stark contrast, in this instance Dr. Gutshall was clearly more qualified than the Petitioner and was hired through a sex-neutral procedure where there was no evidence of discrimination by the screening committee or by the Board of Education which was the hiring entity. Further, while Dr. Petersen was initially named as a co-defendant, prior to the trial he was voluntarily dismissed pursuant to a nominal settlement with Petitioner.

Petitioner also references *Anderson v. Methodist Evangelical Hospital*, 464 F.2d 723 (6th Cir. 1972), to support the claim that respondeat superior applies even where the Board of Education lacks discriminatory intent. *Anderson* predates *Price Waterhouse* by more than fifteen years. Nonetheless, Judge Kent dissented in *Anderson* that the hospital board had no racial animus and he was not satisfied with the district court's findings that the discharge violated Title VII of the Civil Rights Act of 1991, 42 U.S.C. §2000e, *et seq.* Judge Kent explained that he read the Act to require that discrimination necessary to constitute an unlawful employment practice must be discrimination by the employer and, thus, recommended reversal of the Court's decision. The principles subsequently established by this Court in *Price Waterhouse* are contrary to those employed in *Anderson.*

Petitioner further relies on *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and *McCalla v. Ellis*, 446 N.W.2d 904 (1989), *lv denied*, 452 N.W.2d 641 (1990), to support her position that the *Cesaro* decision conflicts with prior rulings on per se employer liability. Yet again, Petitioner can only argue this point through improper over-extension of the holdings of the referenced cases. The *McCalla* decision involved the rape of a female employee by her supervisor, which is not comparable to the present action. The supervisors in both *Meritor Savings* and

McCalla were in positions to make employment decisions, and were found to have sexually harassed the plaintiffs.

Contrary to Petitioner's assertion, the concept of respondeat superior remains intact in the wake of the Court of Appeals' action in this case. The Sixth Circuit's opinion focused on whether the decision maker, i.e., the hiring body, discriminated. If so, liability of the employer would result. However, where the decision maker did not act with unlawful discriminatory intent, no liability would be imposed on the employer, consistent with *Price Waterhouse*. Here, the Superintendent did not have the authority to hire administrators; the Board of Education was solely vested with that power. Moreover, the Board did not make its decision in a vacuum. Petitioner had worked at the district for ten years, and the Board was aware of her qualifications as well as those of Dr. Gutshall.

Incorporation of the facts repeatedly ignored by Petitioner confirms the appropriateness of the Circuit Court's ruling and the absence of merit for Petitioner's request for certiorari. The salient facts are that this was a newly-created administrative position, the position was posted both externally and internally as in the past, external posting in the past had resulted in the hiring of a female administrator while Dr. Petersen was Superintendent, posting externally was gender neutral, a screening committee of women and men interviewed the candidates and concluded that Dr. Gutshall was more qualified, Dr. Petersen recommended the most qualified applicant, and the Board of Education acted without discriminatory intent. It is with these factors in mind that the Sixth Circuit reversed the trial court and held that Petitioner did not sustain her burden of proof. These facts similarly demonstrate that granting certiorari is unwarranted.

III. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS REGARDING THE RETROACTIVE APPLICATION OF THE 1991 CIVIL RIGHTS ACT, CONTRARY TO PETITIONER'S ASSERTION.

In Part III of the Petition for Writ of Certiorari, Petitioner contends that the 1991 Civil Rights Act applies retroactively and thereby imposes a restrictive reading to *Price Waterhouse*. Petitioner erroneously claims that there are conflicting rulings among the circuits on this issue. A survey of opinions of the Courts of Appeal confirms that those circuits reviewing the issue have consistently held that the Act is prospective. Because all circuits addressing the issue have rejected the retroactivity of the 1991 Act, Petitioner's argument is meritless and the Petition must be denied.

In *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), an affirmative action plan between the city, its police department, and a union was challenged on the basis of the new amendments to Title VII. The Sixth Circuit reviewed Supreme Court rulings regarding the retroactivity of statutes in the absence of specific language. The Sixth Circuit noted the ambiguous congressional history, the EEOC policy statement that the Act is prospective, and conflicting district court decisions and concluded:

> This is consistent with our recent decision in *United States v. Murphy*, 937 F.2d 1031 (6th Cir. 1991), where we had to decide whether, absent clear legislative intent, a provision of the False Claims Act should apply retroactively or prospectively. We stated that the choice was "between the broad statement of the law in *Bradley* and the recent affirmation in *Bowen* of the general rule against retrospective application." . . . While recognizing that we frequently have cited *Bradley* as controlling, we nevertheless held that *Bradley* should be read narrowly and should not be applied in contexts where "substantive rights and liabilities," broadly construed, would be affected. . . . Clearly, retroactive application of

> the 1991 Act would affect "substantive rights and liabilities" of the parties to this action.
>
> We hold that the 1991 Act does not apply retroactively to Vogel's claim for damages resulting from the hiring policy the City's police department adopted pursuant to the consent decree. We therefore apply the law that was in effect prior to enactment of the 1991 Act. *Vogel*, 959 F.2d at 598.

Other circuits have reached the same conclusion. See, for example, *Johnson v. Uncle Ben's, Inc.*, 965 F2d 1363 (5th Cir. 1992), refusal to apply §101 retroactively; *Mozee v. American Commercial Marine Service*, 963 F.2d 929 (7th Cir. 1992); *Fray v. Omaha Herald*, 960 F.2d 1370 (8th Cir. 1992).

Additionally, prospective application is consistent with the vast majority of district court decisions. In *Tyree v. Riley*, 783 F.Supp. 877 (D. N.J. 1992), in an extremely detailed analysis, Judge Lechner outlined the Supreme Court's decisions from 1806 to the present on the retroactivity of statutory amendments finding the Act to be prospective. Judge Lechner summarized:

> The principle that statutes operate only prospectively while judicial decisions operate retrospectively is familiar to every law student. *Id.* at 16.

Other district courts finding the Act prospective are: *Johnson v. Rice*, 58 FEP Cases 31 (S.D. Ohio 1992); *Sofferin v. American Air Lines*, 785 F.Supp. 780 (N.D. Ill. 1992) ; *McCullough v. Consolidated Rail Corporation*, 785 F.Supp. 1309 (N.D. Ill. 1992); *VanMeter v. Barr*, 778 F.Supp. 83 (D. D.C. 1991); *Sorlucco v. New York City Police Department*, 780 F.Supp. 202 (S.D. N.Y. 1992), *Khandelwal v. Compuadd Corp.*, 780 F.Supp. 1077 (E.D. Va. 1992); *Simmons v. Southwest Petro-Chem, Inc.*, 58 FEP Cases 78 (D. Ka. 1992); *Conerly v. CVN Company*, 785 F.Supp. 810 (D. Minn. 1992); *McLaughlin v. New York Governor's Office*, 784 F.Supp. 961 (N.D. N.Y. 1992); *Hameister v. Harley-Davison, Inc.*, 785 F.Supp. 113 (E.D. Wis. 1992); *Doe v. Palm Beach County*, 783 F.Supp. 1379 (S.D. Fla. 1992); *Hansel*

v. Public Service Company, 778 F.Supp. 1126 (D. Colo. 1992); *James v. American International Recovery*, 57 FEP Cases 1226 (N.D. Ga. 1992); *Holman v. Macy's South, Inc.*, 57 FEP Cases 1405 (N.D. Ga. 1992); *High v. Broadway Industries*, 57 FEP Cases 1159 (W.D. Mo. 1992).

To support retroactivity and a "conflict" among the circuits, Petitioner cites three federal district court decisions: *Mojica v. Gannett*, 779 F.Supp. 94 (N.D. Ill. 1991), which was issued prior to the EEOC policy statements that the amendments are to be prospective; *LaCour v. Harris County*, 57 FEP Cases 622 (S.D. Tex. 1991), an unreported decision; and *Alexandre v. AMP, Inc.*, 57 FEP Cases 768 (W.D. Pa. 1991), also an unreported decision. The *Mojica* opinion conflicts with *Sofferin* and *McCullough* in the same district. See also *Davis v. Tri-State Mack Distributors*, 57 FEP Cases 1023 (E.D. Ark. 1991); *Graham v. Bodine Electric Co.*, 782 F.Supp. 74 (N.D. Ill. 1992); *Stender v. Lucky Stores*, 780 F.Supp. 1302 (N.D. Cal. 1992); *Bristow v. Drake Street, Inc.*, 57 FEP Cases 1367 (N.D. Ill. 1992); *Burchfield v. Derwinski*, 782 F.Supp. 532 (D. Colo. 1992); *King v. Shelby Medical Center*, 779 F.Supp. 157 (N.D. Ala. 1991). Unquestionably, Petitioner fails to support her contention that a conflict exists among the circuits; thus, certiorari based upon the 1991 amendment is unwarranted.

Even if the 1991 Act is retroactive and affected *Price Waterhouse*, this Court's language that one must consider whether the "employment decision at the time it was made" and who was the "decision maker" was not altered. The amendments focused on whether discrimination was the motivating factor causing harm to be suffered. The employer is not liable if it establishes that it would have made the same decision absent the discrimination. Here, the alleged discriminatory act was the statewide posting of the Director's position. The School District posted in the past, and it would logically post a newly-created administrative position on a statewide basis to assure the broadest qualified applicant pool. Superintendent Petersen testified that a standard procedure was followed for newly created vacancies. In

such cases, after the Board of Education's approval of a position and its qualifications, the Board would notify the Administrators' Association and major Michigan Colleges and Universities. (Petersen at (TR.302). Petitioner was always a viable candidate regardless of the statewide posting. The posting did not foreclose her from consideration. Thus, the same decision to post statewide would have been made, even assuming a discriminatory animus was presented, and certiorari is wholly unwarranted.

IV. PETITIONER'S ASSERTION THAT IF CESARO STANDS IT WILL EXONERATE EMPLOYERS FROM LIABILITY FROM DISCRIMINATORY ACTS AND THAT IT "DEFIES THE RULES OF FAIR PLAY AND SOCIAL JUSTICE" IS WITHOUT FOUNDATION.

Petitioner's argument of social injustice, contained in Part IV of her Petition, distorts the earlier ruling and speciously argues that a social injustice has occurred. (It is not the function of the judiciary to right social injustice; the courts interpret the Constitution and statutes and apply them as they were written.) Petitioner claims that the Superintendent corrupted the process at every level. The evidence controverts this claim since a sex-neutral application process was used, the screening committee and the Board of Education had no discriminatory intent, and a more qualified applicant was hired. As the Appeals Court noted, "the purpose of Title VII is to focus on qualification. That is what the employer did here." 953 F.2d at 256.

Petitioner claims, on page 51 of the Petition, that enforcement of Title VII abuses will be weakened, if not destroyed, if *Cesaro* stands. This contradicts Petitioner's earlier argument for certiorari that the 1991 Civil Rights Amendment would necessitate an alternative conclusion. Petitioner cannot have it both ways.

Petitioner next avers that Title VII's purpose of removing barriers and providing a "level playing field" for women and minorities will be diminished, if not destroyed. Petitioner is not

seeking a level playing field; she seeks the advantage of being granted a newly-created, high level administrative position without any others being considered for the vacancy. She desires that the employer not use a sex neutral process by posting a vacancy to consider a greater applicant pool in an effort to ensure hiring the most qualified applicant, regardless of sex or race. Title VII does not afford Petitioner preferential treatment to the detriment of a more qualified candidate.

Petitioner's assertions in Part IV of her Petition are frivolous and unsupported both legally and factually. Accordingly, denial of the Petition for a Writ of Certiorari is mandated.

CONCLUSION

Petitioner fails to adequately support her contentions with case law or statutes that the Sixth Circuit reached a conclusion which differed from this or other court rulings. This case does not invoke substantive public policy and a social injustice issue to warrant the extraordinary review by this Court. Granting certiorari is unjustified and, therefore, must be denied.

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No. 92-146

In The

Supreme Court of the United States

October Term, 1992

SHARON K. CESARO,

Petitioner,

v.

LAKEVILLE COMMUNITY SCHOOL DISTRICT, LAKEVILLE EDUCATION ASSOCIATION, AND THOR PETERSEN; INDIVIDUALLY AND AS SUPERINTENDENT OF LAKEVILLE COMMUNITY SCHOOL DISTRICT,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. DOES THE RECORD SUPPORT RESPONDENTS' ASSERTION THAT MR. THOR PETERSEN'S DECISION TO POST THE NOTICE OUTSIDE THE DISTRICT IS IRRELEVANT?

Respondent stated on page 6 of its answer, "The external posting was not the ultimate employment decision on which *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) focused and, thus, Dr. Petersen's motivation was irrelevant."

The relevance of the decision by the superintendent to resort to external posting was clearly articulated by the trial court by specific findings of fact:

> Petersen intended to sexually discriminate against Plaintiff, page 8c.
>
> " * * * Gutshall would never have had an opportunity to be considered for the position, had Petersen not discriminated against Plaintiff by refusing to recommend her promotion from within the school system. Moreover, Petersen would have made such an internal promotion recommendation had Plaintiff been a male. The Board unknowingly and unwillingly gave effect to Petersen's discriminatory intent." (Page 18c-19c)
>
> "The conclusion is inescapable that but for the Plaintiff's sex, she would have received this appointment and liability of the Board for this Title VII violation is properly determined based upon Superintendent Petersen's conduct in sexually discriminating against Plaintiff." (Page 20c)
>
> "The evidence supports a finding that Superintendent Petersen did not intend Plaintiff to ever have this position because of her sex." (Page 10c)

At page 17c, the trial court gave its detailed findings regarding the importance of the external posting as a factor in the trial court's decision in favor of Plaintiff. The trial court had the benefit of personally viewing each of the witnesses.

The reasonable conclusion is that without the sex discrimination practiced by Petersen, Mr. Gutshall would

never have been even considered for the position and Mrs. Cesaro would be the director of the special education program at Lakeville High School today. The relevance of the decision by Petersen to publish outside the district was clearly understood and articulated by the trial court.

II. DOES THE RECORD SUPPORT RESPONDENTS' CLAIM THAT THE FOUR PERSON SCREENING COMMITTEE RECOMMENDED GUTSHALL AS THE MOST QUALIFIED?

On page 3 of its answer, Respondent claims that the screening committee recommended Gutshall as the most qualified of the three candidates.

The record does not support that claim. The trial court found at page 4c: "The committee met, considered the applicants and their qualifications, and submitted to the Board a list of the three candidates it deemed most qualified. Plaintiff was one of the three." Respondent seeks to leave the impression that Mr. Gutshall was found by the committee to be the most qualified. Actually, all three, including Plaintiff, were found to be the most qualified among the five applicants.

III. DOES THE RECORD SUPPORT RESPONDENTS' ASSERTION THAT PART IV OF PETITIONER'S PETITION IS FRIVOLOUS AND UNSUPPORTED BOTH LEGALLY AND FACTUALLY?

Respondent states at page 2 of its Answer, "Petitioner's assertions in part IV of her Petition are frivolous and unsupported both legally and factually."

Apparently the trial court did not think that Petitioner's claim was either frivolous or unsupportable. At page 19c, the Court said that, "if the Board's defense here were to be accepted in the face of Superintendent Petersen's sexually discriminatory conduct, it could and would lead to the frustration of one of the purposes of Title VII; providing a remedy for sexual discrimination in employment."

There is little doubt that if *Cesaro* is allowed to stand as precedent in the Sixth Circuit, defense attorneys will regard it as a blue print for advising employers on how to avoid liability for purposeful sex discrimination prohibited by Title VII.

Respectfully submitted,

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